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No. 95-340-CFX
Status: GRANTED

Title: United Food and Commercial Workers Union Local 751, Petitioner
v.
Brown Group, Inc., dba Brown Shoe Company

Docketed:
August 23, 1995

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Gold,Laurence Stephen

Counsel for respondent: Walsh,Thomas C.

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Entry	Date	Note	Proceedings and Orders
1	Aug 23 1995	G	Petition for writ of certiorari filed.
2	Aug 23 1995		Appendix of petitioner filed.
3	Sep 27 1995		DISTRIBUTED. October 13, 1995 (Page 3)
4	Sep 28 1995		Brief of respondent Brown Group, Inc. in opposition filed.
5	Oct 10 1995	X	Reply brief of petitioner filed.
6	Oct 16 1995		Petition GRANTED.
			**********
8	Nov 21 1995		Order extending time to file brief of petitioner on the merits until December 5, 1995.
10	Dec 5 1995		Joint appendix filed.
11	Dec 5 1995		Brief of petitioner United Food and Commercial Workers Union Local 751 filed.
12	Dec 5 1995		Brief amici curiae of American Federation of Government Employees, et al. filed.
13	Dec 5 1995		Brief amicus curiae of United States filed.
18	Dec 8 1995	N	Motion of respondent to strike brief amicus curiae of Maurice and Janes Sugar Law Center for Economic and Social Justice filed.
14	Dec 14 1995		SET FOR ARGUMENT TUESDAY, FEBRUARY 20, 1996. (1ST CASE).
15	Dec 19 1995		CIRCULATED.
17	Dec 20 1995		Order extending time to file brief of respondent on the merits until January 16, 1996.
19	Jan 5 1996	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Jan 16 1996	X	Brief of respondent Brown Group, Inc. filed.
20	Jan 22 1996		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Feb 9 1996		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Missouri.
22	Feb 12 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eighth Circuit.
24	Feb 13 1996	X	Reply brief of petitioner filed.
25	Feb 20 1996		ARGUED.

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No. 94-340

In The Supreme Court of the United States

October Term, 1995

United Food and Commercial Workers Union Local 751,

Petitioner,

v.

Brown Group, Inc., d/b/a Brown Shoe Company,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do Article III standing requirements preclude a federal court from giving effect to Congress' express statutory authorization permitting an exclusive "representative" of the "affected employees" to assert the monetary claims of the represented "affected employees" under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. ———

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751,
Petitioner,
v.
BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

United Food & Commercial Workers Union Local 751 ("the Union") hereby petitions this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in *United Food and Comm. Wrks. v. Brown Group*, 50 F.3d 1426 (8th Cir. 1995).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 50 F.3d 1426 (1995) and is reprinted in the appendix to this certiorari petition ("Pet. App.") at pp. 1a-12a. The Order of the Court of Appeals denying the Union's Petition for Rehearing and Suggestion of Rehearing En Banc is reprinted at Pet. App. 20a. The opinion of the United

States District Court for the Eastern District of Missouri granting defendant Brown Group, Inc.'s Motion to Dismiss is reported at 820 F. Supp. 1192 (1993) and is reprinted at Pet. App. 13a-15a. The opinion of the District Court denying the Union's Motion to Alter or Amend the Judgment is unreported and is reprinted at Pet. App. 16a-19a.

JURISDICTION

The Eighth Circuit issued its decision and judgment herein on April 3, 1995. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 25, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Worker Adjustment and Retraining Notification Act ("WARN") provide:

§ 2(a)(4), 29 U.S.C. § 2101(a)(4):

> the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45.

§ 3(a), 29 U.S.C. § 2102(a):

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—
>
> (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee . . .

§ 5, 29 U.S.C. § 2104:

> (a)(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who

> suffers an employment loss as a result of such closing or layoff for—
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee; and
>
> (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred. . . .
>
> * * *
>
> (5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.
>
> (b) The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have the authority to enjoin a plant closing or mass layoff.

STATEMENT OF THE CASE

The Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-09, provides that covered employers may not order a "plant closing or mass layoff," as statutorily defined (29 U.S.C. § 2101(a)(2) & (3)), without providing notice sixty days beforehand "to each *representative of the affected employees* at the

time of the notice or, if there is no such representative at that time, to each affected employee." 29 U.S.C. § 2102(a) (emphasis supplied). "Representative" is defined in the statute as "an exclusive representative of employees within the meaning of section 159(a) or 158(f) of [the National Labor Relations Act (NLRA)] . . ."

WARN goes on to provide that: (a) if an employer "orders a plant closing or mass layoff in violation of section 2102," the employer is liable "to each aggrieved employee who suffers an employment loss" for back pay and benefits, (29 U.S.C. § 2104(a)(1)), and (b) "a person seeking to enforce such liability, *including a representative of employees* . . . aggrieved under paragraph (1) . . . may sue" in district court (29 U.S.C. § 2104 (a)(5) (emphasis supplied)).

On January 17, 1992, Brown Group, Inc. d/b/a Brown Shoe Co. ("Brown Shoe") mailed a written notice to William T. Treece of the United Food and Commercial Workers International Union ("International"), which announced that Brown Shoe's Dixon, Missouri plant would permanently close and 277 employees would be discharged as a result of the closing. Brown Shoe stated in the letter that the company would begin discharging employees on March 20, 1992. Brown Shoe already had begun discharging employees before sending the January 17 notice, discharged additional employees on January 20, 1992, and continued to discharge employees during February and March, 1992.

On June 16, 1992, United Food and Commercial Workers Union Local 751 ("Local 751" or the "Union"), petitioner herein, filed a complaint in the United States District Court for the Eastern District of Missouri, alleging that the Union was the "exclusive representative of the [Dixon] employees" on January 17, 1992 and at all other times material to the complaint as defined in WARN, 29 U.S.C. § 2101(a)(4). Jurisdiction was alleged under 28 U.S.C. § 1331 and 29 U.S.C. § 2104(a). A copy of the

then current collective bargaining agreement between Local 751 and Brown Shoe was attached to the complaint. The Union also alleged that it, not William Treece or the International, had a right to notice of the Dixon closing sixty days before the closing was ordered in accordance with 29 U.S.C. § 2102(a)(1), and that Brown Shoe had in any event failed to continue the employment of most of the represented employees for a sixty-day period following the notice. An appendix to the complaint identified those Dixon employees who are aggrieved employees under § 2104(a).

The complaint demanded that: (1) Brown Shoe pay each aggrieved employee back pay and fringe benefits for each day of employment loss the employee suffered prior to the expiration of the sixty-day notice period; (2) Local 751 recover from Brown Shoe the cost of this action, including reasonable attorneys' fees; and (3) Local 751 recover such other and further relief on its behalf and that of the aggrieved employees as may be proper.

On April 12, 1993, the District Court issued a memorandum and order granting Brown Shoe's motion to dismiss on the ground that the Union lacked standing to sue for damages for the represented employees. Local 751 thereupon filed a motion to alter or amend judgment asking leave to file an amended complaint seeking declaratory relief and adding affected individuals as parties. That motion was denied by the District Court on March 7, 1994.

On appeal, the Eighth Circuit affirmed the District Court's standing ruling. The Court of Appeals recognized that the UFCW is a statutory "representative" of the aggrieved employees. But the Court held that while the Union "is entitled to bring suit under the WARN Act, [] it does not necessarily follow that the union has standing." Pet. App. 4a.

The Court of Appeals went on to hold that although the failure to provide an adequate, timely notice *to the*

Union, as required by the statute, may "allege[] an injury to the union itself . . . that is concrete and actual" (Pet. App. 6a), the Union does not have direct standing. The statutory remedy for inadequate notice—back pay and benefits for aggrieved employees—said the Eighth Circuit, "would do nothing to remedy the alleged failure of notice to the UFCW." Pet. App. 7a. The Eighth Circuit went on to deny the Union standing to assert the right of the employees the Union represents to monetary relief, relying on the third prong of the associational standing test articulated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)—*viz.*, whether "the claim asserted [or] the relief requested required the participation of the individual members in the lawsuit." Pet. App. 11a. Finally, the Court of Appeals affirmed the district court's denial of leave to amend the complaint. Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

The five courts of appeals—other than the court below—in which a case has been litigated by a union seeking monetary relief for the employees the union represents to redress an employer violation of the Worker Adjustment and Retraining Notification Act, have proceeded on the understanding that WARN provides for—and the Constitution permits—such suits, have exercised jurisdiction over the case, and have reached the merits.

This Court, after noting the question of the union's standing in oral argument, did the same last year in *North Star Steel Co. v. Thomas*, —— U.S. ——, 115 S.Ct. 1927 (1995). *North Star Steel*, the first WARN litigation to come to this Court, involved two consolidated cases, one of which, like this case, was brought by a union seeking to recover the applicable statutory monetary relief for the employees the union represented. *See United Steelworkers of America v. Crown Cork & Seal*

Co., 32 F.3d 53, 55 (3d Cir., 1994) affirmed *sub nom. North Star Steel Co. v. Thomas, supra.*[1]

The Eighth Circuit has now gone the other way and has invalidated Congress' determination to provide for these WARN suits by unions on the theory that this statutory cause of action offends the Constitution's "standing" rules. The constitutional standing question thus raised is both a recurring one—necessarily arising in numerous WARN cases—and one that goes to the heart of the WARN statutory scheme as a whole. Since *North Star Steel*'s approach and result evince this Court's understanding that WARN suits by unions are a proper part of the statutory scheme, the Eighth Circuit's contrary determination warrants immediate review to clarify the law in this regard.

The Eighth Circuit's constitutional ruling, moreover, raises a fundamental and recurring separation of powers issue. There are a number of federal statutes that provide for litigation by a representative designated by statute who is empowered to seek monetary relief on behalf of particular individuals. This Court has proceeded on the

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[1] At oral argument in *North Star Steel*, the question of the union's standing in that case was posed by Justice O'Connor to the union's counsel (who also represents the Union in this case):

> *Mr. Gold*: . . . . Here, we're dealing with a mandatory wage standard or labor standards statute that generates a quite straightforward damages action for failure[] to act, and only a straightforward court damage action.
>
> *Question*: Why does the union have standing to challenge it, Mr. Gold?
>
> *Mr. Gold*: The statute is quite clear in giving the union standing, associational standing to seek such liability, and that is the basis. We believe that Congress in this kind of situation plainly has the constitutional authority to provide such associational standing. . . . I would emphasize, I know that it is not waivable, that the standing issue is not one that to this point has been pursued. It may well be the subject of a petition some day. [1995 WL 301715, Oral Argument, at p. 11.]

This is that petition.

premise that this approach is valid but has done so in passing and without exploring the constitutional standing issues raised in any depth. The Eighth Circuit's decision crystalizes these issues and presents a compelling reason for their resolution.

The question of whether Article III limits Congress' *legislative* power to determine whether a representative may prosecute an action for monetary relief on behalf of individuals who have suffered injury in fact, and if so, under what circumstances, raises a most basic and sensitive issue concerning the relationship between Congress and the federal courts. The federal courts "have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia*, 6 Wheat. 262, 404 (U.S. 1821) (Marshall, C.J.). Whether Congress' law-making powers are to be restricted on the view of the constitutional standing requirement adopted below is therefore a quintessential question for this Court to decide.

Given the nature of the question presented here and of the background law, in the balance of this petition we develop two points.

First, Congress in crafting WARN expressly determined that employer violations of the requirement that plant closing/mass layoff notices are to be provided to unions designated by a group of employees as their exclusive representative can be met by a suit by the union against the employer and that the union in such a suit can seek monetary relief payable to the represented employees on account of the violation. Such suits are, indeed, at the very heart of the statutory enforcement scheme. Congress' intent to provide for WARN cases of the kind the Union brought here, in other words, could not be more clear. Thus, the decision below that Congress cannot, consistent with Article III's standing requirements, enact such a cause of action is a direct frontal attack on Congress' Article I legislative powers. Pp. 9-14, *infra*.

Second, the Eighth Circuit's constitutional ruling rests on the assumption that for the purposes of the standing doctrine, a case in which Congress has determined that a person that has a representational status is to be empowered to bring suit seeking monetary relief payable to the individuals that person represents is on all fours with a case in which Congress has made no such determination and the person bringing suit is proceeding under some general heading of jurisdiction. That assumption is contrary to this Court's overall "standing" jurisprudence, which distinguishes between "constitutional" standing requirements and "prudential" standing requirements and which recognizes that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' . . ," (*Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). The result reached below moreover, puts into question many statutory and common law schemes analogous to that provided for in WARN. Indeed, to take the analogy closest to hand, the Court of Appeal's constitutional ruling cannot be squared with this Court's decision in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) which recognizes union suits to redress employer violations of collective bargaining agreements in which the union seeks monetary relief on behalf of the adversely affected employees.

At the same time, there is no case in this Court squarely treating with Congress' constitutional authority to provide for suits by a representative for individual monetary relief of the kind at issue here. And, the court of appeals law is neither clear nor consistent. The importance of this constitutional issue and the absence of an authoritative ruling directly in point underline the need for review of this case by this Court. Pp. 14-24, *infra*.

1. "The inquiry as to standing must begin with determination of whether the statute in question authorizes

[the remedy sought] at the behest of the plaintiff." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *see also Primate Protection League v. Tulane Ed. Fund*, 500 U.S. 72, 77 (1991), *quoting* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988) ("standing is gauged by the specific common-law, statutory or constitutional law claims that a party presents [and] 'should be seen as a question of substantive law, answerable by reference to the statutory . . . provision whose protection is invoked.' ").

Last term, in *North Star Steel*, the Court began by explicating as follows the basic scheme of the statute at issue here:

> With some exceptions and conditions, WARN forbids an employer of 100 or more employees to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2102(a). The employer is supposed to notify, among others, "each affected employee" or "each representative of the affected employees." 29 U.S.C. § 2102(a)(1). An employer who violates the notice provisions is liable for penalties by way of a civil action . . . . The class of plaintiffs includes aggrieved employees (*or their unions as representatives*), *ibid.*, *who may collect* "*back pay* for each day of violation," § 2104(a)(1)(A), "up to a maximum of sixty days," § 2104(a)(1). [115 S. Ct. at 1929, emphasis supplied].

This explication reflects the Court's understanding that unions can sue under the WARN Act, and in such suits can obtain statutorily-defined monetary recoveries for individual represented employees.

(a) Not surprisingly, this Court's description of the statutory enforcement provisions in *North Star*, brief though it is, accurately summarizes the statutory scheme. WARN was enacted in 1988, long after the federally-regulated system governing collective bargaining was in

place, to provide limited statutory rights concerning plant closings and mass layoffs, actions which effectively terminate the employees' employment tenure and any collective bargaining agreement entered into on the employees' behalf by their exclusive representative. Congress determined that where the workforce has chosen an exclusive bargaining representative pursuant to the procedures provided by the National Labor Relations Act (NLRA) or Railway Labor Act (RLA) and a closing or mass layoff occurs, the protection of employee interests should continue to be entrusted to the statutory representative otherwise responsible for representing the employees with regard to their employment.

WARN therefore defines "representative" as the exclusive representative chosen by employees pursuant to the National Labor Relations Act or Railway Labor Act. Such exclusive representatives are ordinarily "designated or selected . . . by a majority of the employees in a unit appropriate for . . . the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." NLRA § 9(a), 29 U.S.C. § 159(a); *see also* RLA § 2, *Fourth*, 45 U.S.C. § 152, *Fourth*.[2] And, such exclusive representatives owe the represented employees a duty of fair representation, similar to the duty of a fiduciary or trustee. *Conley v.*

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[2] The process for designating the exclusive representative is provided for by statute and administered by the National Labor Relations Board (and, in the case of the RLA, by the National Mediation Board.) NLRA § 9, 29 U.S.C. § 159; RLA § 2, *Ninth*, 45 U.S.C. § 152. *Ninth*. It is an unfair labor practice under the NLRA for an employer to recognize as exclusive representative a union that has *not* been selected by the majority of the employees (NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2); *see also* RLA § 152, *Third* and *Fourth*). Under NLRA § 8(f), 29 U.S.C. § 158(f), in the construction trades a union can be recognized as the exclusive representative before the union is designated by a majority of the particular employee group, but the employees may petition at any time for an election of an exclusive representative under § 9(a). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).

Gibson, 355 U.S. 41, 42 (1957); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

Congress then provided in WARN that employees who have a "representative" should receive the statutory notice of a plant closing or mass layoff *through notice to that representative*, rather than through notice to each employee individually. 29 U.S.C. § 2102(a)(1). Where the employer does not meet the obligation to provide sixty-days notice to the union, Congress provided that the employer, for "violation of section 2102," shall be liable for back pay and benefits to "each aggrieved employee" (29 U.S.C. § 2104(a)(1)), and expressly pretermitted all other remedies for failure to provide notice to the union (29 U.S.C. § 2104(b)). And, the statute provides in terms how "*such liability*"—plainly referring to the very liability just described—shall be calculated (29 U.S.C. § 2104(a)(1)), and how "*such liability*" can be enforced in court, *inter alia*, by "a representative of employees aggrieved under paragraph (1)" (29 U.S.C. § 2104(a)(5)).

The net effect of this scheme, as this Court stated in *North Star Steel*, is to provide for "*penalties* by way of a civil suit" (115 S. Ct. at 1929, emphasis supplied), with the penalties payable to the represented employees rather than to the representative, but with the representative empowered to seek those "penalties" to vindicate *the representative's own statutory right to receive notice.*

(b) Following the express statutory permission, unions acting as exclusive representatives have filed a large proportion of the cases thus far litigated under WARN. And, as we have already noted, the five courts of appeals—other than the court below—faced with union suits under WARN seeking the statutory penalties due represented employees have exercised jurisdiction and reached the merits of the WARN issues raised. *Crown Cork & Seal, supra* (3d Circuit); *United Paperworkers International Union v. Specialty Paperboard, Inc.*, 999 F.3d 51 (2d Cir. 1993); *International Union, United Mine Workers v. Jim Walter Resources*, 6 F.3d 722 (11th Cir. 1993); *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994); *International Bhd. of Teamsters v. American Delivery Service Co.*, 50 F.3d 770 (9th Cir. 1995); *International Alliance of Theatrical & Stage Employees v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1995).[3]

Under the Eighth Circuit's holding in this case, each of these cases should have been dismissed in their entirety for lack of standing, whether the standing issue was raised by the parties or not. *National Organization for Women, Inc. v. Scheidler*, —— U.S. ——, 114 S. Ct. 798, 802 (1994). The result reached below is therefore in direct conflict with the results reached by five other courts of appeals.

The standing holding below is not only at odds with the result reached by these other circuit courts but is also at odds with the intricate scheme Congress created for enforcing the WARN Act. The Eighth Circuit was of the view that only the affected employees could bring suit for the statutory liability prescribed where the requisite notice is not provided. *But where the employees have chosen union representation, that notice is due to the employees' representative, the union, not to each of the employees directly.* Individual employees, therefore, may not be aware whether or not any notice was provided, or,

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[3] A few district courts have directly addressed the standing issue; all except the district court that decided this case have concluded that there is standing. *See United Mine Workers v. Helen Mining Co.*, 9 IER Cases (BNA) 588 (W.D. Pa. 1994); *United Steelworkers v. Keller Industries* (No. TH 92-21-G S.D. Ind. Sept. 21, 1994) (finding standing); *New Orleans Clerks v. Ryan-Walhs, Inc.*, 9 IER Cases (BNA) 391 (E.D. La. 1994) (finding standing); *United Mine Workers of America v. Florence Mining Co.*, 855 F. Supp. 1466 (W.D. Pa. 1994) (finding standing); *Contra Amalgamated Clothing & Textile Workers Union v. Brown Group, Inc.*, 879 F. Supp. 1015 (E.D. Mo. 1993).

if provided, whether the notice provided met the statutory requisites regarding timing, content, and recipient.

In this case, for example, the employees laid off before March 20, 1992, as part of the plant closing announced in the purported WARN notice in January, would not necessarily be aware that their layoffs were in violation of the employer's statutory notice obligation, since the notice was provided only to a union representative (albeit, the complaint maintains, the wrong one). Under the Eighth Circuit's ruling, the Union, the entity to whom the statutory duty is directly due, cannot sue, since the statute in terms makes the monetary remedies provided in § 2104 "the exclusive remedy for any violation of this chapter." 29 U.S.C. § 2104(b). And, the individuals who can sue are not owed the required statutory notice, and may not even be aware of whether there has been a statutory violation to redress.

The holding below, consequently, implicates not only *who* can bring suit for the statutory penalties due employees under the WARN Act, but, as a practical matter, whether anyone can. And, since WARN itself limits the available remedies *other* than the statutory penalties due employees, the decision below goes far to make WARN a dead letter in union-represented workplaces.

2. The Court of Appeals in this case began from the premise that Congress' power to establish a scheme by which a representative is expressly authorized to represent the interests of individuals in litigation is to be judged by the same criteria that apply where there has been no statutory designation of such a representative for the purposes of litigation. That premise is unsound.

The Court has gone to pains to explain the distinction between constitutional and prudential rules of standing, and the consequences of that distinction for purposes of determining the authority of Congress to structure statutory remedial schemes. In *Warth v. Seldin*, 422 U.S. 490,

499 (1975), the Court began its standing discussion by stating:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. . . . A federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action." [citations omitted].

Warth then added:

> Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. . . . [One of these self-imposed, prudential limitations is that] even when the plaintiff has alleged injury sufficient to meet the "case or controvery" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interest. . . [*Id.*]

See also Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).[4]

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[4] Most of this Court's standing cases have involved suits contesting governmental action, and have developed standing criteria that serve to delimit the role of the judiciary with regard to other governmental entities. *See, e.g., Warth v. Seldin*, 422 U.S. at 500 ("Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (where Congress confers statutory standing, "it is clear *that in suits against the government at least*, the concrete injury requirement must remain.") (emphasis added). Whether such limitations apply equally where, as here, there is a dispute between purely private parties and therefore no possibility of judicial interference in the determinations of other governmental entities is itself a question of substantial import raised by this case. A strong argument can be

Statutory considerations can affect the standing inquiry in either of two ways. First, statutes can affect the minimum, Article III injury-in-fact requirement, by "creating legal rights, the invasion of which creates standing." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Warth v. Seldin*, 422 U.S. at 500; *Havens Realty v. Coleman*, 455 U.S. 363, 373 (1982).

Second, statutory grants of authority to litigate a particular dispute "assume[] critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes." *Warth v. Seldin*, 422 U.S. at 500.

In particular, where the Article III injury-in-fact minima are met, "the question whether the litigant is a 'proper party to request an adjudication of a particular issue', *Flast v. Cohen*, 302 U.S. 83, (1968) is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. at 732; *see also Gladstone Realtors v. Bellwood*, 441 U.S. at 100 ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' . . .")

It is precisely because it ignored this Court's teachings regarding Congress' authority to confer litigating authority on persons who might be barred by prudential standing principles absent that statutory authority, that the Eighth Circuit's standing analysis in this case is trebly flawed.

(a) First, the opinion below errs by assuming that Congress cannot, by express action, permit an association

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made that separation of powers considerations counsel broad deference to Congress' determinations concerning the most appropriate litigant to vindicate statutory rights where there are no competing considerations concerning the relationship between various governmental bodies.

to represent its members' interests when the relief sought is individual monetary damages.

The Court of Appeals viewed the authority conferred upon the Union under WARN § 2014(a)(5) to seek to enforce the employer's liability to aggrieved employees as one derived from the Union's associational relationship with its members. Pet. App. 8a-9a, citing *International Union, UAW v. Brock*, 477 U.S. 274, 281 (1986). *Brock*, based on an earlier associational standing case (*Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)), applied a three-part standard governing associational standing to determine whether a union could bring a suit on its members' behalf.

The Eighth Circuit recognized that the first two prongs of the *Hunt* standard are met here: The represented employees themselves have been injured in fact by the employer's failure to provide the statutory recompense for inadequate notice, since the statute specifies that the statutory penalty is to be measured by their loss in pay and benefits, and that the penalty is to be paid to them. And, protecting the represented employees' interests in the event of a plant closing or mass layoff is "germane" (*Hunt*, 432 U.S. at 343) to the Union's purpose.

The Eighth Circuit's representational standing holding thus rests on the third prong of the *Hunt* standard. Because individual monetary damages were being sought, the court below concluded, "the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343, cited at Pet. App. 11a. But neither *Hunt* nor *Brock* arose in a context in which the statute designated an association as a statutory representative for the purposes of securing for its members who have been injured in fact monetary relief. And, the Eighth Circuit simply passed by the question of whether this third aspect of the *Hunt* standard is one dictated by the Article III "case or controversy" requirement, such that Congress cannot consistent with the Constitution

make such an express designation, or an aspect of the prudential standing law.

The general standing principles outlined above, however, lead to the conclusion that the third *Hunt* prong is *not* part of the bedrock injury-in-fact Article III requirement. The associational standing cases do *not* create an exception to the rule requiring actual injury to the claimant, but rather rest on a recognition that in certain circumstances the relationship between two potential litigants—such as a relationship in which one has undertaken to represent and protect the others' interests—is such that an injury to one *is* an injury to the other. As such, associational standing recognizes one of a "variety of circumstances, both traditional and modern, [in which] a party is permitted to appear in court as a formal representative of other interests. Trustees, guardians and personal representatives are familiar examples." Wright, Miller & Cooper, 13 *Federal Practice & Procedure* § 3531.9 at 627 (West 1984).

The first *Hunt* requirement—which requires that there must be the requisite concrete injury to *someone* to assure that the case is one in which the judicial power can be exercised with sufficient focus and specificity—is, to be sure, part of the constitutional standing inquiry. *See Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). And, the second "germaneness" prong ascertains whether it is appropriate to regard an association as a surrogate for the injured individual in forwarding the individual's interests, and may well be part of assuring compliance with the constitutional "case or controversy" dictate as well.[5]

[5] As we develop below, this prong of the *Hunt* test should apply only when the association is in essence a volunteer as a representational litigant. Where the legislature or a common law doctrine *appoints* an organization as a representative of others for purposes that include litigation, the legal determination of representational status should control, with no need to inquire into the organization's internal purposes or contractual understanding with its members.

The third *Hunt* requirement, however, is one that relates to efficient judicial management of a volunteer associational suit, evidencing a *prudential* concern that in the absence of Congressional or other guidance, the courts would have to engage in judicial legislation to determine whether a given self-appointed representative is sufficiently responsive to the interests of individual members to assure that the interests of each such individual are protected.

At the same time we recognize that the courts of appeals are of two minds as to whether the third *Hunt* prong has a constitutional law or a prudential base. *See National Treasury Employees' Union v. United States Merit Systems Protection Board*, 743 F.2d 895, 910 (D.C. Cir. 1984), citing *National Treasury Employees' Union (NTEU) v. Campbell*, 589 F.2d 669, 679 (D.C. Cir. 1978) (if Congress so provides, "NTEU has standing to bring suit on behalf of its injured members for . . . . damages challenging rates negotiated by the Civil Service Commission for federal employees' health insurance"); *compare National Association of Realtors v. National Real Estate Ass'n*, 894 F.2d 937, 941 (7th Cir. 1990) (suggesting that Congress can through statutes create legal rights which support standing, but cannot authorize an association to bring a damage action on behalf of its members). *See also Telecommunications Research v. Allnet Communications Servs., Inc.*, 806 F.2d 1093, 1096 (D.C. Cir. 1986) (citing *NTEU v. Merit Systems Protection Board* and refusing to establish a *per se* rule that associations may never represent their members in actions for direct monetary relief, because in some instances the association may "possess[] a special representational responsibility to the members on whose behalf it sues"); *id.* at 1098 (Bork, J., concurring) (suggesting that "a special representational responsibility" could confer standing upon an association to collect monetary relief for statutory violations of its members' rights if there is a "direct statutory provision" that "confer[s] standing upon an association.");

Kansas Health Care Ass'n v. Kansas Department of Social and Rehabilitation Servs., 958 F.2d 1018, 1022-23 (10th Cir. 1992) (finding that, applying the *Hunt* test, the Kansas Health Care Association lacked standing to litigate a particular case because of the need for individual participation, but characterizing its holding as one based on a "prudential concern . . . related to standing" rather than on a constitutional requirement).

It is also very much to the point that so far as we have been able to ascertain this Court has never squarely ruled on whether the third *Hunt* prong is an expression of the constitutional standing law or the prudential standing law. The resulting uncertainty and its manifestations in the lower court cases support the grant of *certiorari* here.

(b) The Eighth Circuit's analysis of the Union's standing in this case errs, secondly, by assuming that the associational standing doctrine as stated in *Brock* and *Hunt* is fully applicable to a situation, such as the one here, where Congress has prescribed detailed procedures for appointing an entity as the representative of the interests of a class of individuals. That assumption, we submit, is as unsound as the Eighth Circuit's assumption that the third *Hunt* prong *is* part of the constitutional standing law.

As we have noted, in a variety of circumstances, statutory and common laws designate one individual or entity as a representative of another's interests for purposes of litigation. This Court has generally proceeded on the understanding that an entity appointed in accord with procedures or standards established under common law, statute, or decisional law as the representative of another, with express authority to represent that person's interests in court, may consistent with the Constitution appear as a litigant. *See, e.g., Director, Office of Workers' Comp. v. Newport News*, —— U.S. ——, 115 S. Ct. 1278, 1286 (1995) & cases cited (Congress can confer standing upon governmental entities by appointing them as

statutory representative for the compensation or other monetary interests of individuals, "without infringing Article III of the Constitution"); *General Telephone Co. of the Northwest, Inc. v. Equal Employment Opportunity Comm'n.*, 446 U.S. 318, 324 (1980) (the Equal Employment Opportunity Commission has standing to bring suit in its own name to recover backpay for a group of individual discrimnatees); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (Secretary of Labor permitted, as statute provides, to pursue claims for monetary relief for individuals for violation of the Fair Labor Standards Act); *Hodel v. Irving*, 481 U.S. 704, 711-12 (1987) (noting that the Secretary of the Interior is the designated statutory representative for a decedent Indian's surviving claims);[6] Wright, Miller & Cooper, 13 Federal Practice and Procedure § 3531.9, p. 627 (permitting formal representatives such as trustees, guardians, and personal representatives to appear in court to protect the interests of those they represent raises no standing issues worthy of discussion); *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (third party representation permissible where the standards under the common law "next friend" doctrine are met).[7]

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[6] To be sure, the run of the federal statutory examples involve representation by governmental entities. But no reason appears why, *for Article III purposes*, the distinction between public and private representatives is a distinction of legal substance. Whether the representative is a private entity appointed in accord with legislatively determined standards or a part of the executive branch, the entity is forwarding the interests of others; may be representing a group of individuals in a single lawsuit, with the need to represent their diverse interests at the relief stage if not earlier; and is invested with some governmental assurance of adequacy of representation.

[7] The cases in which such legal representatives have been allowed to appear without raising third-party standing questions of constitutional dimension are, of course, legion. In a closely analogous case in which the standing issue *was* actually discussed, the Eleventh Circuit asserted that Congress can develop standards permitting one person or entity to sue on another's behalf without

Here, "the union is no mere volunteer whose representation of others must be checked for adequacy. . . . The labor union has already been certified by a neutral government agency as the "exclusive representative" of the bargaining unit employees." *Office & Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 67 (1992) (citation omitted) (R. Ginsburg, J.).

Under these circumstances, the standards and procedures established by Congress to assure representational fidelity should be enforced, without appending a separate judicial inquiry applicable where there has been no such Congressional action. And, this should be the case whether the representative in question is an organization or an individual or a corporation.

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transgressing its constitutional authority. *See Erkins v. Bryan*, 663 F.2d 1048, 1051 (11th Cir. 1981), *cert. denied*, 454 U.S. 989 (1982) (29 U.S.C. § 501(b), permitting a "member" of a union as statutorily defined to represent the union's interests "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization" to do so without any personal stake in the outcome of the litigation, since the statute says that she may); *see also United States ex rel. Kreindler & Kreindler v. United Technologies Corporation*, 985 F.2d 1148 (2nd Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 2962 (1993) (federal *qui tam* statute, permitting a citizen to sue to recover for monetary damages caused the government through fraudulent claims, is valid under Article III because the statute effectively assigns the government's claims to qui tam plaintiffs); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994) (same).

The Seventh Circuit, however, in *National Association of Realtors v. National Real Estate Ass'n, supra*, reads *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), *aff'd per curiam*, 454 U.S. 1025 (1981) as establishing a broad principle that Congress may not authorize someone whose rights have not been directly invaded to sue concerning an invasion of someone else's right (894 F.2d at 941; *see also Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990)). *McClure*, however, did not involve a situation in which an individual was statutorily appointed to represent the rights of particular individuals who had suffered injury in fact, but, instead, the designation of an individual with no cognizable legal injury to sue regarding an abstract legal question.

Whether we are correct in that conclusion or not, the general considerations concerning the degree to which Article III constrains Congress in providing for representational litigation where the designation of the representative is governed by statutory standards and procedures to assure adequacy of representation is a second constitutional standing question raised by the Eighth Circuit opinion upon which the lower courts need further guidance.

(c) Finally, the Eighth Circuit's standing analysis is irreconcilable with the cases of this Court recognizing that Congress *can* confer standing upon a litigant to pursue another party's legal interests as long as the *litigant itself* has suffered a cognizable legal injury due to the defendant's action.

Under WARN, the Union *itself* has a statutory right to notice, here violated according to the complaint, and has that right as part of its overall representational role with regard to the employees' employment-related interests under the federal labor laws. The court below so recognized, but viewed any direct injury to the Union as distinct from its representational status, and held that the Union lacks standing to redress its direct injury because the statutory penalty inures not to the Union's own treasury but to the represented employee's personal account. Pet. App. 6a-7a.

This analysis disregards yet again the distinction between constitutional and prudential standing principles, and disregards as well the authority of Congress to legislate so as to override those standing principles erected by the Court purely as a matter of judicial self-restraint. In particular, this Court's cases make clear that "so long as this [Article III 'distinct and palpable injury'] requirement is satisfied, a person to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others. . ." *Warth v. Seldin*, 422 U.S. 501. And, in *International Union, UAW v. Hoosier*

Cardinal Corp., 383 U.S. 696, 699-700 (1966), the Court expressly held that unions *may* sue for damages *for represented employees* where the collective bargaining agreement negotiated by the union has been infringed, reading § 301(b) of the Labor Management Relations Act, 29 U.S.C. § 185(b), to so permit.

Here, the Union's right infringed is statutory rather than contractual. But the distinction between violation of self-created norms and violation of Congressionally prescribed norms is of no moment to the standing analysis. Rather, here, as in *Hoosier Cardinal*, the Union *itself* suffered an injury damaging to the Union's role as exclusive representative—there, breach of an agreement negotiated as representative, here failure to receive notice due it as representative. No reason appears why it is more appropriate in one instance than in the other to permit a union that has in fact suffered cognizable legal injury to vindicate that injury by forwarding the employment-related interests of represented employees, where—as here and as in *Hoosier Cardinal*—*Congress expressly so provides.* The logic of the situation is that the authority of Congress, recognized in *Hoosier Cardinal*, to permit unions to seek individual monetary relief for the employees the union represents as a means of vindicating the union's *own* legal rights is not limited to contractual cases but extends to violations of statutory requirements as well.

In sum, the Eighth Circuit's standing holding merits review both because of its potential impact on WARN litigation and because it raises three interrelated, substantial questions concerning Congress' power, consistent with Article III, to shape statutory remedial schemes by providing for representational litigation.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751,

Petitioner,

v.

BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 94-1929

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 751, as representative of the aggrieved employees,
Appellant,

v.

BROWN GROUP, INC., doing busines as BROWN SHOE CO.,
Appellee.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION; UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION; THE GUILD/SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE,
Amicus Curiae.

Submitted Dec. 14, 1994

Decided April 3, 1995

Rehearing and Suggestion for Rehearing
En Banc Denied May 25, 1995

Before BOWMAN and LOKEN, Circuit Judges, and BOGUE,* Senior District Judge.

BOWMAN, Circuit Judge.

The United Food and Commercial Workers Union, Local 751 (UFCW or union) appeals from the judgment of the District Court [1] granting the motion to dismiss filed by Brown Group, Inc., d/b/a Brown Shoe Company. We affirm.

I.

Brown Shoe mailed a letter dated January 17, 1992, to an employee of the United Food and Commercial Workers International, but not to Local 751, advising the union that Brown Shoe's plant in Dixon, Missouri, would be closed, with displacement of the 277 workers in the plant beginning on March 20, 1992. The UFCW alleges that Brown Shoe began to terminate workers immediately after sending the letter.

On June 16, 1992, the union filed suit in the District Court pursuant to the Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§ 2101-2109 (1988), seeking money damages. Under ordinary circumstances, the WARN Act requires that an employer give sixty days notice of plant closure or mass layoff to the employee representatives (or to each employee, if there is no representative) and to certain government entities. 29 U.S.C. § 2102(a). The UFCW claims that the plant closure notice to the International union was inadequate under the WARN Act and that, even if the notice was proper, the employees represented by the UFCW were discharged before sixty days had elapsed, in violation of 29 U.S.C. § 2102.

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* The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

[1] The Honorable Edward L. Filippine, Chief Judge, United States District Court for the Eastern District of Missouri.

On July 29, 1992, Brown Shoe filed a motion to dismiss in accordance with Federal Rule of Civil Procedure 12, challenging the union's standing to bring the suit. The District Court granted the motion on April 12, 1993. Ten days later, on April 22, the UFCW filed a motion to alter or amend the judgment, Fed.R.Civ.P. 59(e), asking the court either to allow the union's suit to proceed or to allow the UFCW thirty days to amend its complaint so it could request declaratory relief and add individual plaintiffs. That motion was denied on March 7, 1994. The UFCW appeals and we affirm.[2]

II.

The District Court determined that the UFCW alleged no injury to itself, which must be shown by a plaintiff in order to demonstrate direct or individual standing, and had not met the constitutional test to assert indirect or associational standing on behalf of its members. *See Pennell v. City of San Jose*, 485 U.S. 1, 7, 108 S.Ct. 849, 855, 99 L.Ed.2d 1 (1988) (noting these two types of standing). We review these conclusions of law *de novo*. *Howe v. Ellenbecker*, 8 F.3d 1258, 1261 (8th Cir.1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 1373, 128 L.Ed. 2d 49 (1994). Because Brown Shoe challenged the UFCW's standing based only on the complaint, we " 'accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.' " *Pennell*, 485 U.S. at 7, 108 S.Ct. at 855 (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)).

The union argues that its standing derives from the WARN Act, which provides:

> A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons simi-

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[2] The UFCW's motion to amend its notice of appeal, ordered taken with the case, is granted.

> larly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

29 U.S.C. § 2104(a)(5). A "representative" under the statute is "an exclusive representative of employees" as defined in certain of the federal labor laws. *Id.* § 2101 (a)(4). It is undisputed that the UFCW is such a representative and thus is entitled to bring suit under the WARN Act, but it does not necessarily follow that the union has standing. "Standing does not refer simply to a party's capacity to appear in court," but rather to " 'whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*' " *International Primate Protection League v. Administrators of Tulane Educ. Fund.*, 500 U.S. 72, 77, 111 S.Ct. 1700, 1704, 114 L.Ed.2d 134 (1991) (quoting *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984)) (emphasis added by the Supreme Court).

The burden is on the person seeking to invoke the jurisdiction of the federal court to demonstrate that he has standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). A federal statute may give a putative plaintiff the right to bring suit, thus relieving him of the judicially-created, prudential standing requirements,[3] *Warth*, 422 U.S. at 501, 95 S.Ct. at 2206, but the party seeking to have his claim heard nevertheless must comply with the Article III constitutional case or controversy require-

[3] Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

ments. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979). "In no event . . . may Congress abrogate the Art. III minima. . . ." *Id.* The constitutional inquiry is the same whether it is an individual or an organization seeking to assert standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982).

A.

While the UFCW contends in its brief on appeal that it has individual standing to bring this suit, Brown Shoe asks us not to consider this issue, arguing that the union did not plead or raise the question of its direct standing to sue until the complaint was dismissed, and thus is now precluded from doing so. Brown Shoe's argument is of no avail. It concluding that the union "ha[d] not alleged any injury to itself," the District Court did rule on the UFCW's direct standing, however summarily. *UFCW Local 751 v. Brown Group, Inc.*, 820 F.Supp. 1192, 1193 (E.D.Mo.1993). Thus we may properly consider the issue on appeal.

"A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751, 104 S.Ct. at 3324. We have some doubt that the UFCW's complaint alleges "personal injury" that comports with the constitutional requirement.[4] The gravamen of the union's claim clearly is injury to its members that resulted from the alleged failure of notice. *See* Complaint at ¶ 1 ("This is an action for monetary dam-

[4] Amici curiae assert that the union sustained injury because the failure of notice "deprived the Union from [sic] obtaining the dues which which would otherwise have been payable to them [sic] had the workers received 60 days notice." Amicus Brief at 7. The UFCW made no such allegation of injury in its complaint, in any of its other filings in District Court, or in its brief to this Court.

ages against Brown Group, Inc. . . . for its failure to provide wages and benefits. . . ."); *id.* at ¶ 5 ("Plaintiff is the certified exclusive bargaining representative of the aggrieved Brown Shoe employees on whose behalf the relief prayed for herein is sought. . . ."); *id.* at ¶ 6 ("This action is filed by Plaintiff on behalf of 277 employees of Defendant's Dixon plant who were represented by Plaintiff. . . ."); *id.* at ¶ 9 (alleging that most of the union employees are "aggrieved" within the meaning of the WARN Act and noting attached list identifying "aggrieved employees").

In its brief, however, the UFCW claims that "the Union was injured in its right to notice prescribed by statute," Brief for Appellant at 2, and the UFCW does allege in its complaint that the notice given by Brown Shoe did not comply with the notice requirement of the WARN Act because the individual to whom the notice was sent "is not the exclusive representative of the affected employees," Complaint at ¶ 7. Thus, construing the complaint in the manner most favorable to the union, as we must, we will assume that its allegation of failure of statutory notice alleges an injury to the union itself. *See Warth*, 422 U.S. at 500, 95 S.Ct. at 2206 ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'") (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 1149 n. 3, 35 L.Ed.2d 536 (1973)). Arguably, the union has alleged "an invasion of a legally protected interest" that is concrete and actual. *Northeastern Fla. Chapter of the Associated General Contractors of Am. v. City of Jacksonville, Fla.*, —— U.S. ——, ——, 113 S.Ct. 2297, 2302, 124 L.Ed.2d 586 (1993).

The second constitutional element of direct standing, that the injury be fairly traceable to the alleged conduct of the defendant, is not an issue in this case. As for the third factor, however, we conclude that the relief the

UFCW requests will not redress the union's asserted injury.

The UFCW asks for backpay and fringe benefits for the aggrieved employees, its own attorney fees and costs in bringing the suit (the discretionary award of which is provided by statute, 29 U.S.C. § 2104(a)(6)), and "such other and further relief on its behalf and that of the aggrieved employees as may be proper." Complaint at ¶ 10. It is the catch-all prayer for relief that the UFCW claims will redress the alleged failure of notice to the union. We disagree. We do not think that the boilerplate remedies language quoted above, broad and nonspecific as it is, comports with the constitutional requirement of redressability envisioned by the Supreme Court in *Allen* and its other cases on the subject. While the sweeping prayer for relief may be sufficient for a court to broaden the remedy post-judgment, it does not satisfy the constitutional requirement that the party alleging injury also must request a remedy that will redress the injury. The UFCW, even if it has properly pleaded injury to itself as a result of the alleged failure of statutory notice, has not sought a specific remedy for its injury. An award of monetary damages to any aggrieved employees would no nothing to remedy the alleged failure of notice to the UFCW.

Contrary to the UFCW's argument, the WARN Act's provision that designates the union as a proper plaintiff to assert violations of the Act in federal court does not relieve the union of its obligation to meet the constitutional requirements of standing.[5] Because the UFCW has

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[5] The situation in this case is distinguishable from that presented in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1965). In *Hoosier*, a case where standing was not the issue, the Court noted that a union had standing to bring suit under § 301 of the Labor Management Relations Act of 1947 to recover monetary damages claimed by its members. Those claims, however, were made "pur-

failed to seek relief that will redress its alleged injury, we hold that the union lacks individual standing to bring this suit.

B.

As we discussed above, it is clear that the UFCW's complaint asserted associational standing on behalf of the union's members. "[U]nder certain circumstances, injury to an organization's members will satisfy Article III and allow that organization to litigate in federal court on their behalf." *International Union, UAW v. Brock*, 477 U.S. 274, 281, 106 S.Ct. 2523, 2528, 91 L.Ed.2d 228 (1986). The Supreme Court has articulated a three-part test that must be met for an association to have standing to bring suit on behalf of its members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). First, the UFCW's members must have standing to sue in their own right. Here, given the allegations of the complaint, it is plain that the aggrieved employees would have individual standing. Section 2104(a)(5) allows suit by the union's members to the extent they are aggrieved employees, and they obviously are in a position to assert the necessary injury, causation, and redressability to demonstrate standing. Second, the interests the UFCW seeks to protect must be "germane to the [union's] purpose." *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441. Notice of plant closure and member layoffs, and the loss of pay and benefits to

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suant to the terms of a collective bargaining contract." *Id.* at 699, 86 S.Ct. at 1110. The union was seeking "to vindicate employee rights under a contract the union obtained." *Id.* at 700, 86 S.Ct. at 1110. The Court further noted that the union's standing "implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract." *Id.* The union had individual, direct standing because its cause of action arose from a contract to which it was a party. In contrast, the claims the UFCW makes here are based on the WARN Act, rather than on a collective bargaining agreement.

members upon premature closure, are interests that are "germane" to the UFCW's purpose as the exclusive bargaining agent of its members' terms and conditions of employment with Brown Shoe.

It is the third part of the *Hunt* test, that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," *id.*, that poses problems for the UFCW. If the union had requested only prospective relief, the likelihood of success in asserting associational standing would have been improved. *See Warth*, 422 U.S. at 515, 95 S.Ct. at 2213-14 ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind."); *Arkansas Medical Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir.1993). But the union is not seeking a declaratory judgment or an injunction.[6] Moreover, the damages sought are not for the UFCW's own monetary loss,[7] nor does the union claim to have an assignment of the mone-

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[6] The UFCW suggests that the court could have awarded the union injunctive relief. *See* Brief for Appellant at 14 ("Because the Union alleged a personal stake in the outcome of the WARN dispute, the court had power to hear its claims, at least for purposes of awarding an injunctive remedy."). Although it is not clear what action of Brown Shoe the UFCW would have had the court enjoin, it is doubtful that injunctive relief would have been forthcoming even if it had been sought. The WARN Act, 29 U.S.C. § 2104(b), provides that "[t]he remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff."

[7] The catch-all prayer for relief in the union's complaint is not sufficient to assert a claim for monetary damages for the union's own injury. *See supra* p. 1430.

tary claims of its members. *See Warth*, 422 U.S. at 515, 95 S.Ct. at 2213-14.

Under the WARN Act, an aggrieved employee ordinarily can recover as damages (subject to certain reductions) up to sixty days worth of backpay and benefits due under an employee benefit plan, "including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred." 29 U.S.C. § 2104(a). It is apparent that the relief the UFCW seeks here—the backpay and benefits to which its members are entitled by law—would require individualized proof.

If the case were to go to trial, the court would first be required to determine on a case-by-case basis which Brown Shoe employees who are also union members are "aggrieved" within the meaning of the WARN Act, and the extent to which they are aggrieved. For example, according to the complaint, the allegedly aggrieved employees were terminated at different times over a two-month period. If the notice to the international union were held to be sufficient under the WARN Act, then the court would need to know the date of each employee's layoff in order to calculate damages, necessitating individualized examination of each union member's employment record. Further, because the aggrieved employees who are members of the union were paid on a piecework basis, rather than being paid an hourly wage, calculation of damages would require proof specific to each employee. Amounts to be awarded for medical expenses, if any, is another question of fact that could be resolved only on an individual basis.

"[T]he damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized

proof." *Warth*, 422 U.S. at 515-16, 95 S.Ct. at 2213-14. Each union member who wishes to recover WARN Act damages from Brown Shoe must participate in the suit so that his or her right to damages can be determined and the quantum of damages can be calculated by the court on the basis of particularized proof. Therefore, the union cannot meet the third part of the *Hunt* test and is precluded from asserting associational standing. *Cf. Brock*, 477 U.S. at 288, 106 S.Ct. at 2532 (holding that participation of individuals was not required where the district court would not determine damages because "the unique facts of each UAW member's claim will have to be considered by the proper state authorities [post-judgment] before any member will be able to receive the benefits allegedly due him"). We conclude that the District Court was correct in holding that the UFCW lacks not only individual standing but also associational standing to assert the claims it has made in its complaint.

III.

The UFCW contends that the District Court erred in denying its motion to alter or amend judgment. Specifically, the union argues on appeal that it should have been permitted to amend its complaint. We review the court's ruling for abuse of discretion. *Concordia College Corp. v. W.R. Grace & Co.*, 999 F.2d 326, 330 (8th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 926, 127 L.Ed.2d 218 (1994).

The UFCW in its motion to alter or amend judgment sought leave to amend its complaint to request declaratory relief and to add individual plaintiffs. The District Court was troubled by the union's delay in seeking leave to amend. Brown Shoe, in its motion to dismiss the complaint, even suggested that an amended complaint might be in order. Nevertheless, the court noted, the UFCW failed to move to amend its complaint during the nearly nine months that Brown Shoe's motion to dismiss was

pending. It was not until ten days after the court dismissed the union's suit for lack of standing that the union requested leave to amend the complaint, by way of its motion to alter or amend the judgment.

"Although a pretrial motion for leave to amend one's complaint is to be liberally granted, different considerations apply to motions filed after dismissal." *Humphreys v. Roche Biomedical Lab., Inc.*, 990 F.2d 1078, 1082 (8th Cir.1993). Here, the union has made no attempt to explain or to justify its delay in seeking leave to amend —in spite of having been put on notice (by the opposing party, no less) of the possible need to amend. We cannot say the District Court abused its broad discretion in denying the UFCW's motion to alter or amend the judgment. *See Wayzata Bank & Trust Co. v. A & B Farms*, 855 F.2d 590, 595 (8th Cir.1988).

IV.

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. MISSOURI, E.D.

No. 4:92CV01134 ELF

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751, As Representative of the Aggrieved Employees,
Plaintiff,

v.

BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Defendant.

April 12, 1993

MEMORANDUM AND ORDER

FILIPPINE, Chief Judge.

This matter is before the Court on defendant's motion to dismiss.

Plaintiff's complaint is brought pursuant to the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109, on behalf of 277 employees of defendant's Dixon, Missouri, plant.[1] Plaintiff is the cer-

[1] The WARN Act requires under certain circumstances that an employer shall not order a plant closing or mass layoff until the end of a sixty day period after the employer serves written notice of the order. § 2102. The notice is to be given to each affected employee or the employee's representative, to the state dislocated worker unit, and to the unit of local government where the layoff is to occur. *Id.* An employer who orders a plant closing or mass layoff in violation of the Act is liable to each aggrieved employee for back pay and benefits. § 2104.

tified exclusive bargaining representative of the employees on whose behalf the suit is brought. For its relief, plaintiff requests that each aggrieved employee receive back pay and various fringe benefits and that plaintiff recover its costs and attorneys' fees.

In its motion, defendant contends plaintiff does not have standing to seek the monetary damages provided for by the WARN Act. Plaintiff asserts in its response that its standing is expressly provided for by Congress in § 2104(a)(5) of the Act.

Section 2104(a)(5) provides in part that "[a] person seeking to enforce such liability, including a representative of employees . . . may sue either for such person or for other persons similarly situated, or both, ..." Despite plaintiff's assertion to the contrary, this section does not eliminate the necessity that plaintiff satisfy the requirements of constitutional standing. In order to satisfy constitutional standing under Article III, a plaintiff must show personal actual or threatened injury. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607-1608, 60 L.Ed.2d 66 (1979). The actual or threatened injury may exist solely by virtue of statutes which create legal rights. *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). However, while Congress may expand standing to the full extent permitted by Article III, it may not abrogate Article III's minimum requirements. *Gladstone Realtors*, 441 U.S. at 100, 99 S.Ct. at 1608; *Warth*, 422 U.S. at 501, 95 S.Ct. at 2206 ("so long as [Article III's] requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others . . . .").

Plaintiff has not alleged any injury to itself. However, even in the absence of injury to itself, an association such as plaintiff may have standing as the representative of its members if 1) its members would otherwise have standing

to sue in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Defendant maintains that plaintiff cannot satisfy the second and third requirements of this test. Because it did not believe the test to be applicable, plaintiff did not address whether or not its requirements are satisfied.

The third element of the *Hunt* test generally does not present the same obstacle to associational standing when the relief requested is declaratory or injunctive as opposed to monetary. However, when an organization seeks to recover monetary relief on behalf of its members, courts have found that such claims necessarily require participation of individual members in the suit. *See, e.g., United Union of Roofers, Waterproofers, and Allied Trades No. 40, v. Insurance Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir.1990); *Telecommunications Research & Action Ctr. v. Allnet Communication Serv., Inc.*, 806 F.2d 1093 (D.D.Cir.1986) (associational standing denied where damages could be calculated by applying a simple formula). Here, plaintiff does not seek declaratory or injunctive relief, and requests damages only for its members. Because plaintiff seeks only to recover monetary damages on behalf of its members, the Court finds plaintiff cannot satisfy the third element of the *Hunt* test.

Accordingly, after careful consideration,

IT IS HEREBY ORDERED that defendant's motion to dismiss is GRANTED.

APPENDIX C

[Filed Mar. 7, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV01134 ELF

UNITED FOOD AND COMMERCIAL WORKERS UNION
LOCAL 751, As Representative Of The
Aggrieved Employees,
Plaintiff,

v.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY,
Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's motion to alter or amend the judgment. Defendant opposes the motion.

This Court granted defendant's motion to dismiss so as to dismiss this action without prejudice. This ruling was based on the determination that plaintiff union lacked standing to pursue its claim. Specifically, the Court concluded that plaintiff did not allege injury to itself and its claim for damages would require the participation of individual members of the union in the lawsuit. The Court expressly noted that plaintiff did not request declaratory or injunctive relief. Pursuant to Federal Rule of Civil Procedure 59(e), plaintiff asks the Court to alter or amend its dismissal ruling by with-

drawing that ruling and either allowing the action "to proceed, as pleaded, due to the special nature of the relationship of a labor organization, such as plaintiff, and its members" or "substituting an Order granting plaintiff 30 days to file an amended complaint seeking declaratory relief and adding affected individuals as parties to this action."

Rule 59(e) provides in relevant part that, within ten days of entry of judgment, a litigant may move for additional findings, for amendment of the court's findings, and for amendment of the judgment in accordance with the amended or added findings.[1] A Court has broad discretion in deciding whether to grant a motion under Rule 59(e). *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir.), *cert. denied*, 488 U.S. 820 (1988); *Harris v. Arkansas Dept. of Human Servs.*, 771 F.2d 414, 416-17 n. 3 (8th Cir. 1985). Such a motion may be used to "reconsider issues previously before [the court], *see* [*White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982)], and generally [to] examine the correctness of the judgment itself." *Ray E. Friedman & Co. v. Jenkins*, 824 F.2d 657, 660 (8th Cir. 1987). A Rule 59(e) motion may not be used, however, "to expand the judgment to encompass new issues." *Id.* Arguments which could and should have been made before entry of final judgment may not be asserted through a Rule 59(e) motion. *Bannister v. Armontrout*, 4 F.3d 1434, 1440 (8th Cir. 1993); *Concordia College Corp. v. W.R. Grace & Co.*, 999 F.2d 326, 330 (8th Cir. 1993); *see Wayzata Bank & Trust Co. v. A & B Farms*, 855 F.2d 590, 595 (8th Cir. 1988) (district court did not abuse its discretion in denying a motion to alter or amend judgment that was based on a setoff issue that could have been raised before entry of judgment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017 (8th Cir.

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[1] There is no dispute that plaintiff timely filed its motion to alter or amend.

1988) (district court is correct in not considering a constitutional issue first raised in a post-judgment motion). Additionally, a Rule 59(e) motion may be denied where it seeks relief based on grounds "already rejected by the district court" in its challenged ruling. *Lewis v. United States,* 555 F.2d 1360, 1362 (8th Cir. 1977) (per curiam).

After careful consideration of the motion, the response, and the record in light of these principles, the Court will deny the motion to alter or amend. To the extent plaintiff reiterates positions it took in response to the motion to dismiss, those arguments were fully considered at the time this Court entered its ruling and plaintiff has not persuaded the Court that those arguments should be revisited at this time. The Court will not consider plaintiff's other arguments because they were not raised until after the Court entered its ruling and plaintiff has not asserted or shown any basis for the delay in presenting these arguments to the Court. Plaintiff's unexplained delay in seeking leave to amend is particularly troublesome.

In its original brief supporting the motion to dismiss, defendant noted the possibility that the union might want to amend its complaint. Plaintiff did not expressly address this argument, request leave to amend, or submit a proposed amended complaint at any time during the pendency of the motion to dismiss. It was only after the Court ruled against plaintiff that plaintiff sought leave to amend its complaint. Although plaintiff would have been entitled to amend the complaint without leave of Court prior to the dismissal, *see* Federal Rule of Civil Procedure 15(a), that right terminates after dismissal. *Dorn v. State Bank of Stella,* 767 F.2d 442, 443 (8th Cir. 1985) (per curiam). Moreover, while a pretrial motion to amend is liberally granted, "different considerations apply to motions [to amend] filed after dismissal." *Humphreys v. Roche Biomedical Lab., Inc.,* 990 F.2d

1078, 1882 (8th Cir. 1993); *Harbor Ins. Co. v. Essman,* 918 F.2d 734, 739 (8th Cir. 1990). In particular, a failure to explain a delay in seeking leave to amend supports the denial of a request for leave to amend submitted after dismissal. *See Humphreys,* 990 F.2d at 1082. Plaintiff has not persuaded this Court that, under the circumstances, an amendment of the complaint is proper.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to alter or amend is DENIED.

Dated this 7th day of March, 1994.

/s/ Edward L. Filippine
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1929EMSL

UNITED FOOD and COMMERCIAL WORKERS
INTERNATIONAL UNION, ETC.,
Appellant,

VS.

BROWN GROUP, ETC.,
Appellee.

ORDER DENYING PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 25, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
SEP 28 1995
OFFICE OF THE CLERK

No. 95-340

In The

Supreme Court of the United States

October Term, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751,

Petitioner,

vs.

BROWN GROUP, INC. d/b/a BROWN SHOE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eighth Circuit correctly determined that the Petitioner, United Food and Commercial Workers Union Local 751, had failed to establish in its complaint its standing under Article III of the Constitution to assert the monetary damage claims of its members under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109.

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29 U.S.C. § 2101-2109 ..... *passim*

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CONSTITUTIONAL PROVISION INVOLVED

The relevant provision of Article III of the United States Constitution provides, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2.

STATEMENT OF THE CASE

Petitioner United Food and Commercial Workers Union Local 751 ("Union"), on behalf of its members, sued Respondent Brown Group, Inc. d/b/a Brown Shoe Company ("Brown Shoe") on June 16, 1992, in the United States District Court for the Eastern District of Missouri, alleging a violation of the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109. The basis of the Union's complaint was that Brown Shoe's January 17, 1992 notice to its employees of the closure of its facility in Dixon, Missouri failed to provide sufficient or appropriate notice to those employees of Brown Shoe's intention to close its Dixon plant.

The Union was the collective bargaining representative of the unionized work force of the Dixon, Missouri shoe manufacturing facility of Brown Shoe.[1] Brown Shoe's non-

1. Brown Shoe's Statement of the Case assumes *arguendo* that all well-pleaded facts of the Union's complaint are true, as it must for purposes of the review of a motion to dismiss. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

salaried employees at the Dixon, Missouri plant worked on piece rates until the plant was closed in 1992.

In its complaint, the Union alleged that Brown Shoe had violated the rights of the Union's members and Brown Shoe employees under the WARN Act. The Union sought monetary damages on behalf of two hundred and seventy-seven (277) former employees of Brown Shoe who were members of the union while they were employed. The Union alleged that Brown Shoe began the terminations of its employees on January 3, 1992 and continued those terminations during the months of February and March, 1992. The Union's complaint also alleged that assuming the January 17, 1992 WARN notice was sufficient, most, but not all, of Brown Shoe's employees had been subject to layoff before expiration of a sixty (60) day notice period on March 17, 1992. Attached to the Union's complaint was a chart outlining, by employee, the last date on which each individual performed services for Brown Shoe.

The Union filed its complaint "as representative of the aggrieved employees," and did not identify itself as proceeding on its own behalf in the caption of the complaint. It requested monetary damages **only** for the allegedly aggrieved employees and did not seek either declaratory or injunctive relief. The Union alleged in the complaint that it was "the certified exclusive bargaining representative of the aggrieved Brown Shoe employees **on whose behalf** the relief prayed for herein is sought." The Union further alleged that the complaint was filed "on behalf of" two hundred and seventy-seven employees of Brown Shoe's Dixon plant.

Within its prayer for relief, the Union sought no damages for itself aside from attorney's fees and sought no remedies derived from a collective bargaining agreement. It asserted instead a statutory WARN Act claim for back pay and fringe benefits for the allegedly aggrieved employees. The Union also added a

standard generalized prayer for "such other and further relief on its behalf and that of the aggrieved employees as may be proper."

On July 29, 1992, Brown Shoe filed a motion to dismiss the complaint on the grounds that the Union lacked standing to assert the individual monetary claims of its members. In its motion to dismiss, Brown Shoe argued that the Union did not have associational standing to bring the action on behalf of its members. Brown Shoe also argued that the Union should not be permitted to amend its complaint to add individual "aggrieved employees" as plaintiffs in order to establish subject matter jurisdiction. In response, the Union ignored the issue of the addition of parties or amendment of the complaint and instead argued that it did, in fact, have associational standing. It did not seek leave to amend its complaint to add individual plaintiffs at any time prior to the district court's ruling on the motion to dismiss. The district court, on April 12, 1993, granted Brown Shoe's motion to dismiss, concluding that it was without jurisdiction because the Union had "not alleged injury to itself" and lacked constitutional standing to bring a WARN Act claim for monetary damages on behalf of its members. The district court's dismissal of the Union's complaint was without prejudice.

Ten days later, on April 22, 1993, the Union filed a motion to alter or amend judgment, seeking leave to amend its complaint to add as individual plaintiffs the allegedly aggrieved employees whom the Union represented and to seek declaratory judgment on its own behalf. It was not until the Union filed its motion to alter or amend judgment that it raised the issue of its standing to sue on its own behalf under the WARN Act. At no time did the Union seek leave to amend its complaint to add allegedly aggrieved employees or to assert a claim on its own behalf until **after** the district court dismissed the action, even though the possibility of amending the complaint had been raised in Brown Shoe's memorandum in support of its motion to dismiss over eight months before. Instead the Union waited ten months after its

initial complaint was filed to seek leave to amend its complaint to establish a jurisdictional base for the court to rule on its members' claims for monetary damages, and it did so only when its complaint had been dismissed.

On March 7, 1994, the district court denied the Union's motion to alter or amend judgment. In his order denying the Union's motion to amend the complaint, Judge Fillippine noted, "In its original brief supporting the motion to dismiss, defendant noted the possibility that the union might want to amend its complaint. Plaintiff did not expressly address this argument, request leave to amend, or submit a proposed amended complaint at any time during the pendency of the motion to dismiss. It was only after the Court ruled against plaintiff that plaintiff sought leave to amend its complaint. (Appendix to Petition for a Writ of Certiorari [hereinafter "App."] at 18a). The court refused the Union permission to amend, concluding that "Plaintiff's unexplained delay in seeking to amend is particularly troublesome." (App. at 18a).

The Union appealed the district court's order dismissing the case and its order denying its motion to alter or amend judgment to the United States Court of Appeals for the Eighth Circuit. In affirming the district court's order, the Eighth Circuit held that the Union had failed to meet its burden of establishing either direct or associational standing, and that, therefore, the district court had properly dismissed the Union's complaint for lack of jurisdiction. (App. at 8a, 11a). With respect to the Union's direct standing to assert its own rights, the Eighth Circuit held that the relief requested by the Union in its complaint would not redress the union's asserted injury. (App. at 7a). It rejected the Union's argument that its "catch-all prayer for relief" would redress the injury resulting from Brown Shoe's alleged failure of notice to the Union. (App. at 7a). The Eighth Circuit reasoned, "We do not think that the boilerplate remedies language . . . , broad and non-specific as it is, comports with the constitutional requirement of

redressability envisioned by the Supreme Court in *Allen [v. Wright*, 468 U.S. 737 (1984)] and its other cases on the subject." (App. at 7a). The court also specifically rejected the Union's argument that the language of the WARN Act granting a union a right to sue to enforce the Act "relieve[s] the union of its obligation to meet the constitutional requirement of standing." (App. at 7a).

With respect to the Union's associational standing to assert the monetary damage claims of its members, the Eighth Circuit held that the Union had failed to meet the third part of the test for associational standing set forth by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), *i.e.*, that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (App. at 9a). The Eighth Circuit reasoned that the relief the Union requested — backpay and benefits for its members — would require individualized proof because of the varying times of termination of each employee as alleged in the complaint as well as the fact that the employees "were paid on a piecework basis." (App. at 10a).

The Eighth Circuit also upheld the district court's denial of the Union's motion to alter or amend judgment and rejected the Union's argument that it should have been permitted to amend its complaint after that complaint had been dismissed. (App. at 11a-12a). The Eighth Circuit reasoned that because "the union has made no attempt to explain or to justify its delay in seeking leave to amend — in spite of having been put on notice (by the opposing party, no less) of the possible need to amend," the district court had not abused its discretion in denying the Union's motion to alter or amend judgment. (App. at 12a).[2]

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2. On January 31, 1994, while the Union's motion to alter or amend judgment was pending in the district court in this case, sixty-three of the members represented by the Union in this lawsuit filed their own complaint in (Cont'd)

SUMMARY OF THE ARGUMENT

The Petitioner in this case has not presented this Court with any grounds for the granting of a petition for writ of certiorari. There is not one issue involved in this case and upon which the Eighth Circuit ruled which has not been long settled by this Court and the federal courts of appeals. There is no disagreement between the federal appellate courts on the issue of a union's standing under the WARN Act to assert the monetary damage claims of its members under the Act. Nor is there an important question of federal law which has not been, but should be, settled by this Court or has been decided in a way that conflicts with the applicable decisions of this Court.

The Eighth Circuit did nothing more in this case than apply this Court's well-established principles of constitutional standing. Its decision that the Union lacked standing to assert its own claims was based on its application of the test for constitutional standing set forth by this Court. The Eighth Circuit's holding that the Union had also failed to establish that it had standing to assert the individual monetary claims of its members under the test set forth in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), was entirely consistent with this Court's holding in *Warth v. Seldin*, 490 U.S. 422 (1975), that the test for associational standing reflects constitutional rather than prudential concerns. Thus, the Eighth

(Cont'd)

the United States District Court for the Eastern District of Missouri against Brown Shoe, on behalf of themselves and similarly situated employees, alleging the same violation of the WARN Act as that asserted in this case. *Aaron et al. v. Brown Group, Inc. d/b/a Brown Shoe Co.*, No. 4:94CV000207 TIA (E.D. Mo.). Plaintiffs in the *Aaron* case have amended their complaint three times to add an additional seventy-nine plaintiffs, all of whom were represented by the Union when they were employed at Brown Shoe. The *Aaron* case is currently on interlocutory appeal to the Eighth Circuit on the issue of the appropriate state statute of limitations applicable to WARN Act claims in Missouri. No. 95-2069 EMSL (8th Cir.).

Circuit's application of the *Hunt* test to the allegations of the Union's complaint was correct, as was its conclusion that Congress could not, through the WARN Act, eliminate the requirements of Article III.

In short, the fundamental principles of constitutional law and separation of powers which the Union in its petition asserts are raised by the Eighth Circuit's ruling are simply not present in this case. No valid reason exists for the granting of the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

A. The Eighth Circuit's Ruling Raises No "Fundamental And Recurring Separation Of Powers Issue" Which This Court Need Decide.

The Eighth Circuit's determination that this Union had not adequately invoked the jurisdiction of the federal courts by failing to establish in its pleading a case or controversy under Article III of the United States Constitution was compelled by this Court's long-settled and well-established precedent. Its holding is entirely consistent with the long line of federal cases which require a litigant to establish in its pleadings that it has standing to invoke the federal court's jurisdiction, whether that litigant is seeking to enforce its own rights or, as an association, the rights of its members. Indeed, it was the Union's own failure to establish in its complaint its standing to assert its own rights and the rights of its members which compelled dismissal of its complaint rather than the application of an incorrect constitutional analysis on the part of the Eighth Circuit.

The Union's petition for a writ of certiorari is premised on a fundamental misperception of the principles of standing established by this Court and applied by the federal courts of appeals. The underlying premise of the Union's argument to this

Court — as it was in the courts below — is that because Congress, in the WARN Act, granted unions the *right* to sue for violations of the statute, it also granted unions *standing* to sue under the WARN Act. This argument ignores the consistent holdings of this Court that Congress cannot by statute eliminate the requirements of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). Thus, in *Gladstone*, this Court held, "In no event, . . . may Congress abrogate the Art. III minimum: A plaintiff must always have suffered a distinct and palpable injury to himself . . . that is likely to be redressed if the requested relief is granted." 441 U.S. at 100 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)). And in *Warth*, this Court held, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." 422 U.S. at 499.

Thus, a congressional grant of a right to sue does not in itself establish the standing of a litigant under Article III of the Constitution. Congress could not in the WARN Act confer standing on this union either expressly or impliedly in an extra constitutional manner so that the Union could assert either its own rights or the rights of its members under the statute. While Congress could in the WARN Act grant the union a *right* to sue and thus eliminate *prudential* considerations attached to standing, it could not eliminate the *constitutional* requirements of Article III. These *constitutional* requirements are precisely those that the Eighth Circuit applied.

Therefore, the "fundamental and recurring separation of powers issue" which the Union contends is raised by the Eighth

Circuit's ruling in this case is one that has long been settled by this Court. Congress does not have the ability, through the exercise of its Article I legislative powers, to confer standing to a litigant beyond the requirements of Article III. A case or controversy must still exist and it is the province of the federal courts to determine whether the requirements of Article III have been met. *Cf. Marbury v. Madison*, 1 Cranch 137 (1803). The Eighth Circuit correctly determined that "the WARN Act's provision that designates the union as a proper plaintiff to assert violations of the Act in federal court does not relieve the union of its obligation to meet the constitutional requirement of standing." (App. at 7a). The Eighth Circuit's ruling is entirely consistent with this Court's holdings in *Warth*, *Lujan* and *Gladstone* that Congress may not eliminate the requirements of Article III. Because there is no fundamental constitutional question which must be answered by this Court, there is no valid basis for granting the Union's petition.

B. No United States Court Of Appeals Has Rendered A Decision In Conflict With The Eighth Circuit's Ruling In This Case.

Contrary to the Union's misleading assertions in its petition, not one federal court of appeals has even addressed the issue of a union's standing to bring the monetary claims of its members under the WARN Act, let alone reached a decision contrary to that of the Eighth Circuit. In fact, the Eighth Circuit was the first and, as of this date, is the only federal court of appeals to confront directly the issue of a union's constitutional standing under the WARN Act to seek to collect monetary damages for its members. There is absolutely no disagreement among the circuit courts of appeals on the issue presented in the Union's petition.[3]

3. There is, however, disagreement among the federal district courts which have ruled directly on this issue. The Union erred in stating that every court which has directly confronted the issue has "concluded that there is (Cont'd)

The Union's attempt to imply a split in the courts of appeals by contending that in every case in which a federal appellate court has decided an appeal in a WARN Act case in which a union was the plaintiff, the court proceeded on the assumption that the union had standing, is nothing but legal sophistry. In none of the six cases cited by the Union, *International Alliance of Theatrical & Stage Employees v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1995); *International Brotherhood of Teamsters v. American Delivery Service Co.*, 50 F.3d 770 (9th Cir. 1995); *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994), *vacated*, ___ U.S. ___, 115 S.Ct. 2272 (1995); *United Steelworkers of America v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994), *aff'd sub nom. North Star Steel Co. v. Thomas*, ___ U.S. ___, 115 S.Ct. 1927 (1995); *International Union, United Mine Workers v. Jim Walter Resources*, 6 F.3d 722 (11th Cir. 1993); *United Paperworkers Int'l Union v. Specialty*

(Cont'd

standing." (Petition at 13). In fact, as Respondent pointed out in its brief to the Eighth Circuit, two courts, aside from the Eastern District of Missouri, have denied a union's standing to bring monetary damage claims on behalf of their members under the WARN Act. *Sales Drivers, Helpers and Dairy Employees, International Brotherhood of Teamsters, Local Union No. 683 v. Bohemian Distributing Co.*, No. 93-1592-B (AJB) (S.D. Cal. 1994); *Office and Professional Employees International Union, Local 2 v. Federal Deposit Insurance Corporation*, 138 F.R.D. 325 (D.D.C. 1991), *earlier ruling rev'd on other grounds*, 962 F.2d 63 (D.C. Cir. 1992); *see also Amalgamated Clothing and Textile Workers Union v. Brown Group, Inc.*, 879 F. Supp. 1015 (E.D. Mo. 1993). Moreover, each of the cases cited by the Union in its petition was decided *before* the Eighth Circuit issued its opinion in this case. Since the Eighth Circuit issued its opinion, only one other court has ruled directly on the same issue and it has followed the Eighth Circuit's ruling in this case, holding that a union does not have standing to assert monetary claims for a violation of the WARN Act on behalf of its members. *In re Hanlin Group, Inc.*, ___ B.R. ___, 1995 WL 511870 (Bankr. N.J. Aug. 25, 1995). These courts, as well as those listed in the petition, are the only ones which have ruled on the specific issue of a union's standing to assert the individual monetary claims of its members under the WARN Act. A split in the district courts, however, is not grounds for granting a petition for a writ of certiorari.

Paperboard, Inc., 999 F.2d 51 (2d Cir. 1993), was the issue of the union's constitutional standing to pursue the monetary claims of its members raised, argued or briefed by either party, or addressed or ruled on by either the district or the appellate courts. Thus the issue addressed by the district court, appellate court and this Court in *Crown Cork & Seal*, as this Court is aware, was the appropriate statute of limitations for WARN Act claims. ___ U.S. at ___, 115 S.Ct. at 1929. The same issue was ruled on by the Second Circuit in *Specialty Paperboard*, 999 F.2d at 52, and the Sixth Circuit in *Peabody Coal*, 38 F.3d at 851. In *Jim Walter Resources*, 6 F.3d at 723, and *American Delivery Service*, 50 F.3d at 776, the issue decided by the Eleventh and Ninth Circuits was the definition of a "single employer" for purposes of the WARN Act.[4] Finally, in *Compact Video Services*, 50 F.3d at 1468, the issue involved in Ninth Circuit's ruling was whether a sale of corporate assets was "a WARN event."[5]

The Union's argument that by reaching the merits in these cases, the courts impliedly ruled that they had jurisdiction and that, therefore, the plaintiff unions had constitutional standing, is erroneous. While it is true that a federal court has a duty to "satisfy itself not only of its own jurisdiction, but also of the lower courts in a cause under review," *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934), as a practical matter, if the issue of standing — even though it is jurisdictional — has not been raised or

4. Moreover, in *Jim Walter Resources*, an individual was named as a plaintiff in the caption of the complaint, and, as a consequence, the issue of standing raised in this case — where no individual employees were named as plaintiffs — was not present. 6 F.3d at 722.

5. Standing may still be an issue in both *American Delivery Service* and *Peabody Coal* because both those cases have been remanded, *American Delivery* by the Ninth Circuit, 50 F.3d at 778, and *Peabody Coal* by this Court's decision in *North Star Steel*, ___ U.S. ___, 115 S. Ct. 1927 (1995); *see* ___ U.S. ___, 115 S. Ct. 2272 (1995), ___ F.3d ___, 1995 WL 461295 (6th Cir. 1995). Because standing is jurisdictional, it may not be waived, and, therefore, may still be raised by any of the parties in those cases on remand.

addressed by either the parties or the lower court, an appellate court's opinion reaching the merits does not necessarily imply that the court even considered the issue of a particular plaintiff's standing. *Cf. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 242 (1990) (Brennan, J., concurring) (Court's holding on standing "pure dictum" because issue was "not directly presented by the parties, was not reached by the court below, and is not among the questions on which certiorari was granted"); *Allen v. Wright*, 468 U.S. 737, 764 (1984) (Court's opinion in *Coit v. Green*, 404 U.S. 997 (1971), of limited precedential value on issue of standing because lower court ruling summarily affirmed in *Green* did not include ruling on issue of standing).

Moreover, as a general rule, an appellate court will not entertain an argument not presented to it or to the lower court. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Hormel v. Helvering*, 312 U.S. 552 (1941); *Helverson v. Wood*, 309 U.S. 344 (1940); *Rubin v. Weinberger*, 524 F.2d 497 (7th Cir. 1975); *Hutton v. United States*, 501 F.2d 1055 (6th Cir. 1974); *Allen Industries v. C.I.R.*, 414 F.2d 983 (6th Cir. 1969). In *Singleton*, this Court stated, "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." 428 U.S. at 120-21.

To infer, therefore, from the appellate courts' rulings on the merits in the cases cited by the Petitioner that those courts actually ruled on the plaintiff unions' constitutional associational standing to assert the monetary claims of their members is a strained inference at best. The Union's argument is nothing more than an attempt to establish some basis — however tenuous — for the granting of a petition for writ of certiorari when there is clearly no dispute among the federal courts of appeals on this issue. Such an interpretation of the discretionary certiorari jurisdiction of this Court is contrary to both the spirit and the letter of Rule 10 of this Court's Rules. The only federal court of

appeals to rule on the issue of a union's constitutional standing to assert the individual monetary claims of its members under the WARN Act is the Eighth Circuit in this case. There can be no split of authority in the courts of appeals when only one court has ruled on the specific question at issue.

C. The Eighth Circuit's Holding Is Consistent With This Court's Well-Established Principles Of Standing.

Article III of the Constitution restricts the judicial power of the federal courts to actual "cases" or "controversies" and the issue of standing is one at the heart of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As this Court explained in *Warth v. Seldin*, 422 U.S. 490, 498 (1975), "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. . . . [I]t is founded in concern about the proper — and properly limited — role of the courts in a democratic society. This Court further explained the principles of standing in *Allen v. Wright*, 468 U.S. 737, 752 (1984), when it stated:

> Determining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

(Citing *Valley Forge Christian College v. American United For Separation of Church and State, Inc.*, 454 U.S. 464, 472-73 (1982)).

This Court has differentiated between constitutional (Article III) standing and prudential limitations on standing. *Lujan*, 504 U.S. at 560; *Gladstone*, 441 U.S. at 99-100; *Warth*, 422 U.S. at 498. The requirement of constitutional standing seeks to ensure a concrete Article III "case or controversy" by focusing on the plaintiff's "harm." *Warth*, 422 U.S. at 498-99. Prudential standing limitations prevent a court from adjudicating "questions of broad social import where no individual rights would be vindicated and limit access to the federal court to those litigants best suited to assert a particular claim." *Gladstone*, 441 U.S. at 100. With respect to prudential considerations, Congress may grant a right to sue to persons who otherwise might be barred by prudential limitations. *Gladstone*, 441 U.S. at 100; *Warth*, 422 U.S. at 501; *Sierra Club v. Morton*, 405 U.S. 727 (1972). Congress may not, however, expand by statute the case or controversy limitations imposed upon litigants by Article III. *Gladstone*, 441 U.S. at 100; *Trafficante*, 409 U.S. at 209. As this Court held in *Valley Forge*, "[O]f one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." 454 U.S. at 475-76.

This Court has also distinguished immediate or direct standing from associational standing. *Warth*, 422 U.S. at 511. Immediate or direct standing exists when a plaintiff is asserting its own rights; associational standing involves enforcement of the rights of some or all of an association's members. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Warth*, 422 U.S. at 511. The Court has not differentiated between the associational standing of a voluntary organization with that of involuntary organization, as the Union urges it to do in this case. In either case, a plaintiff must demonstrate "such a personal stake in the outcome of the controversy as to warrant his

invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 498-99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The questions set forth in *Allen* and the test set forth in *Warth* and *Hunt* are precisely those which the Eighth Circuit addressed and applied in this case. Its conclusion — that the Union lacked constitutional standing to assert the monetary damage claims of its members under the WARN Act — is in accord with this Court's decisions.

1. The Eighth Circuit Correctly Held That The Union Lacked Article III Standing To Sue On Its Own Behalf For Alleged WARN Act Violations.

With respect to the Union's failure in its complaint to establish its standing to assert its own claim of an alleged violation of the WARN Act, there can be no doubt that the Eighth Circuit correctly applied the test set forth by this Court to determine whether a plaintiff has established the minimum necessary for constitutional standing. "At an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)." *Valley Forge*, 454 U.S. at 472; *see also Lujan*, 504 U.S. at 560; *Allen*, 468 U.S. at 753; *Warth*, 422 U.S. at 498 (1975); *Sierra Club*, 405 U.S. at 740-41 n. 16.

The Eighth Circuit determined that the Union in this case had not alleged in its complaint the third prong of the constitutional test, an injury "likely to be redressed by the requested relief," and had not, therefore, established that it had constitutional standing

to assert its own claims. (App. at 5a).[6] In the Eighth Circuit the Union asserted that its own injury — apart from the injury to its members — was that it had not received the correct form of statutory notice of the closing of the Dixon facility required under the WARN Act. (App. at 7a). It argued that its catch-all prayer for relief would redress its alleged injury. (App. at 7a). The Eighth Circuit disagreed with the Union's argument, holding that "[w]e do not think that the boilerplate remedies language . . . , broad and non-specific as it is, comports with the constitutional requirement of redressability envisioned by the Supreme Court in *Allen* and other cases on the subject. . . . The UFCW, even if it has properly pleaded injury to itself as a result of the alleged failure of statutory notice, has not sought a specific remedy for its injury." (App. at 7a).

How the Eighth Circuit's application of this Court's test for constitutional standing to the specific facts of this case is inconsistent with the application of such a test by other federal courts of appeals or this Court's precedent is a question left unanswered — indeed, left unaddressed — in the Union's petition. As this Court instructed in *Allen*, the Eighth Circuit engaged in a "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to adjudication of the particular claims asserted." 468 U.S. at 752. The Union in this case was required by the long standing principles of this Court to establish that it had Article III standing in its complaint. *Lujan*, 504 U.S. at 560; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 231; *Warth*, 422 U.S. at 508; *Grace v. American Central Ins. Co. of St. Louis*, 109 U.S. 278, 284 (1883).

6. The Eighth Circuit also expressed doubt that the Union had alleged in its complaint sufficient "personal injury" to satisfy the first element necessary to establish constitutional standing, stating that "the gravamen of the union's claim clearly is injury to its members that resulted from the alleged failure of notice." (App. at 5a). The court held, however, that construing the complaint in a manner most favorable to the Union, it would "assume that its allegation of failure of statutory notice alleges an injury to the union itself." (App. at 6a).

Moreover, standing cannot be "inferred argumentatively from averments in the pleadings," *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1883), but instead "must affirmatively appear in the record." *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884); *see also King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887) (facts supporting constitutional jurisdiction must appear "affirmatively from the record"). In this case, therefore, the union had the affirmative duty to "allege . . . facts essential to show jurisdiction." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). It did not do so. It was the Union's own failure, in its complaint, to assert the necessary elements of standing, which led to the dismissal of its complaint, not any error in the constitutional analysis of the Eighth Circuit.

The Union's petition for a writ of certiorari also rests on the mistaken assumption that the Eighth Circuit in this case held that a union may *never* sue an employer under the WARN Act. Thus, the Union makes the sweeping generalization that the lower court's ruling "raises a fundamental and recurring separation of powers issue," (Petition at 7), and that it "implicates not only *who* can bring suit for the statutory penalties due employees under the WARN Act, but, as a practical matter, whether anyone can." (Petition at 14).[7] This is simply not the case. The Eighth Circuit

7. The fallacy of the Union's argument that the Eighth Circuit's ruling "implicates not only *who* can bring suit for the statutory penalties due employees under the WARN Act, but, as a practical matter, whether anyone can," (Petition at 14) is demonstrated by the fact that the individual employees for whom the Union seeks to collect monetary damages in this case have filed their own action under the WARN Act to collect their own damages for the same alleged violation of the WARN Act. *Aaron et al. v. Brown Group, Inc. d/b/a Brown Shoe Co.*, No. 4:94CV000207 TIA (E.D. Mo.). Clearly, in this case, the Eighth Circuit's ruling does *not* implicate whether "anyone" can sue under the WARN Act — the individual employees clearly can. Moreover, as this Court has held, "[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974); *see also* (Cont'd)

made clear that its holding was that **this** union had failed to establish **in its complaint** that it had constitutional standing to assert either its own rights or the rights of its members under the WARN Act. It did **not** hold, as the Union implies in its petition, that the provision in the WARN Act granting unions the right to sue was unconstitutional, that no union may ever file a lawsuit for WARN Act violations, or that no union will ever have Article III standing to file such a suit. Instead, the Eighth Circuit held that **this union** had failed in its complaint to establish the necessary elements of constitutional standing. Had the union in this case sought relief which would have redressed the alleged injury it received, it may have been able to establish direct standing to sue Brown Shoe. Had it, as the Eighth Circuit specifically held, requested only prospective relief, "the likelihood of success in asserting associational standing would have been improved." (App. at 9a). Had the union in this case ever simply amended its complaint to add as plaintiffs the individual employees who are now suing Brown Shoe in their own right, it would not have failed to establish associational standing.

The fact is, however, that the Union in this case did not bother to seek leave to amend its complaint, even when it was put on notice by Brown Shoe of the jurisdictional defects in its pleading, until **after** its complaint was dismissed by the district court. This fact was commented on by both the trial court — "Plaintiff's unexplained delay in seeking leave to amend is particularly troublesome," (App. at 18a) — and the appellate court — "Here, the union has made no attempt to explain or to justify its delay in seeking leave to amend — in spite of having been put on notice (by the opposing party, no less) of the possible

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(Cont'd)

Valley Forge, 454 U.S. at 464 ("This view would convert standing into a requirement that must be observed only when satisfied. . . . [W]e are unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit. The law of averages is not a substitute for standing.").

need to amend." (App. at 12a). Thus, it was the Union's own failure to establish that it had standing to sue Brown Shoe under the WARN Act which compelled dismissal of its complaint. Both the trial and the appellate courts applied the correct test announced by this Court for determining whether direct standing had been established in the Union's complaint.

2. The Eighth Circuit Correctly Held That The Union As An Association Lacked Article III Standing To Sue For Monetary Damages On Behalf Of Its Members For Alleged WARN Act Violations.

With respect to the Union's associational standing to assert the monetary damage claims of its members, the Eighth Circuit's ruling is equally in accord with the tests set forth by this Court to determine such standing. This Court has held that "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton*, 428 U.S. at 113. In *Singleton*, this Court explained the reasoning behind the rule:

> First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the

> extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.

Id. at 114.[8]

When an association seeks to assert the rights of its members, as the Union has in this case, it must meet the constitutional requirements of standing just as any other Plaintiff. *Warth*, 422 U.S. at 515-16. In this case, the Eighth Circuit applied the appropriate test — the test set forth by this Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) — to determine that the Union had not alleged sufficient facts to establish Article III standing to assert the monetary damage claims of its members. In *Hunt*, this Court established a three prong test to determine constitutional associational standing, each prong of which must be established in the complaint to confer standing on a litigant seeking to assert the rights of others: "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343.

The Eighth Circuit correctly surmised that the Union had failed to meet the third prong of the *Hunt* test that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (App. at 9a). Examining the requested relief — monetary damages for its members — the

8. The fact that only one hundred and forty-two former employees of Brown Shoe have asserted their WARN Act rights in the litigation which arose after the Union's complaint in this case was dismissed, rather than the two hundred and seventy-seven on whose behalf the Union prosecuted this case lends credence to this Court's suggestion in *Singleton* that "the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." 428 U.S. at 113-14.

court concluded that "the damages sought are not for the UFCW's own monetary loss, nor does the union claim to have an assignment of the monetary claims of its members." (App. at 9a-10a). It reasoned that because the individual members of the union were terminated at different times and were paid on a piecework basis, "calculation of damages would require proof specific to each employee," and, hence, "[i]t is apparent that the relief the UFCW seeks here — the backpay and benefits to which its members are entitled by law — would require individualized proof." (App. at 10a).

The Eighth Circuit's reasoning is in harmony with a long line of federal decisions establishing that a union is not "the general litigating agent of its members." *United States ex rel. United Brotherhood of Carpenters & Joiners Local Union No. 20228 v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976). The federal courts have consistently held that while a union may have standing to sue on behalf of its members for monetary or injunctive relief when it does so to vindicate the employees' rights under a collective bargaining agreement, a union does not have standing to assert its members' claims arising independently of a collective bargaining agreement. *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of America*, 18 F.3d 1161 (4th Cir. 1994) (union lacked standing to sue employer on behalf of its members under Racketeer Influenced and Corrupt Practices Act); *United Brotherhood of Carpenters and Joiners of America v. Ohio Carpenters Health and Welfare Fund*, 926 F.2d 550 (6th Cir. 1991) (union lacked standing to sue employer under the Labor Management Reporting and Disclosure Act for monetary claims of its members); *United Union of Roofers, Waterproofers and Allied Trade No. 40 v. Insurance Corp. of America*, 919 F.2d 1398, 1400 (9th Cir. 1990) (union lacked standing to seek to recover money damages on behalf of its members for payment on a surety bond); *United Steelworkers of America v. University of Alabama*, 599 F.2d 56 (5th Cir. 1979) (union lacked standing to claim monetary damages for its members for alleged violations of

members' constitutional rights); *International Woodworkers of America v. Georgia-Pacific Corp.*, 568 F.2d 64, 66 (8th Cir. 1977) (union lacked standing to assert monetary damage claims of its members under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981); *Local 194, Retail, Wholesale and Dept. Store Union v. Standard Brands, Inc.*, 540 F.2d 864 (9th Cir. 1976) (union lacked standing to assert monetary damage claims of its members under Title VII); *Woerfel*, 545 F.2d at 1151 (union lacked standing to sue under § 301(b) of the Labor Management Relations Act for monetary damages arising outside the collective bargaining agreement under the Miller Act). It is also well established that an association's claim for monetary damages on behalf of its members requires the individual participation of those members, and, consequently, the association lacks constitutional standing to sue for those monetary damages. *Warth*, 422 U.S. at 515-16; *Insurance Corp.*, 919 F.2d at 1400; *Telecommunications Research & Action Center v. Allnet Communication Service, Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986); *Simer v. Rios*, 661 F.2d 655, 682 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982); *United Steelworkers of America v. University of Alabama*, 599 F.2d 56, 59 (5th Cir. 1979); *Georgia Pacific*, 568 F.2d at 66; *Woerfel*, 545 F.2d at 1152; *Standard Brands*, 540 F.2d at 865; *Office and Professional Employees Int'l Union Local 2, AFL-CIO v. Federal Deposit Insurance Corp.*, 138 F.R.D. 325 (D.D.C. 1991); *Organization of Minority Vendors, Inc. v. Illinois Central Gulf Railroad*, 579 F. Supp. 574, 590 (N.D. Ill. 1982).

(a) This Court's Holding In *Warth v. Seldin* Makes Clear That The *Hunt* Test Is Constitutional Rather Than Prudential.

The Union argues to this Court that the Eighth Circuit's analysis regarding its associational standing to assert the rights of its members is flawed because the lower court assumed that the third element of the *Hunt* test was a *constitutional* rather than

prudential standing requirement. The Union argues that "the third *Hunt* prong is *not* part of the bedrock injury-in-fact Article III requirement," (Petition at 18), and that, because Congress may eliminate prudential standing requirements by granting a statutory right of action to a litigant, the third prong of the *Hunt* test is inapplicable to the Union's WARN Act claims brought on behalf of its members. The Union made the same argument below, and, while not explicitly rejecting it, the Eighth Circuit did so implicitly by applying the third prong of the *Hunt* test as a constitutional rather than prudential requirement. The Union's argument to this Court concludes with the assertion that "so far as we have been able to ascertain this Court has never squarely ruled on whether the third *Hunt* prong is an expression of the constitutional standing law or the prudential standing law." (Petition at 20).

Petitioner need look no further than this Court's opinion in *Warth* to discover that the third element of the *Hunt* test is indeed a constitutional rather than prudential standing consideration. In *Warth*, this Court differentiated between constitutional and prudential standing limitations on federal jurisdiction. 422 U.S. at 498-99. With respect to the constitutional element of standing, the Court stated, "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit." *Id.* at 498. The Court then distinguished such constitutional concerns from the prudential limitations on standing:

> Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a 'generalized grievance'

> shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. . . . Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties.

Id. at 499 (citations omitted).

Congressional action, the Court held, may affect the requirements for establishing standing in two ways. Constitutional standing may be affected by Congress creating legal rights through statutory action, the invasion of which satisfies the first requirement — "actual or threatened injury" — of Article III. *Id.* at 500. The other two requirements of constitutional standing must still be met. With respect to *prudential* standing requirements, the Court stated that "the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing, that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes." *Id.* The Court held that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Id.* at 501. The Court also cautioned, however, that "Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Id.*

Having differentiated between the two types of standing, the Court then went on to apply its principles to the three classes of plaintiffs suing in *Warth*. The first class of litigants were individuals who asserted they had standing as a class of persons

who had been damaged by the allegedly unconstitutional zoning ordinances at issue. *Id.* at 502. The Court held that these plaintiffs did not have constitutional standing to assert their claims because they could not establish the minimum requirements of Article III: "that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Id.* at 505. The Court then considered the second class of plaintiffs, who were taxpayers claiming that they suffered economic injury because of the allegedly discriminatory zoning practices. *Id.* at 508. It was to these plaintiffs that the Court applied *prudential* standing requirements, holding that the prudential standing rule "bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves" and denying standing. *Id.* at 509-510.

Finally, the Court considered the standing of the third class of plaintiffs, the associations asserting the monetary damage claims of their members. *Id.* at 510. To these plaintiffs, the court applied a test for *constitutional* standing. It held:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The possibility of such representational standing, however, does not eliminate or attenuate the *constitutional* requirement of a case or controversy. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of

> the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 511 (emphasis added). The Court then concluded that the associations did not have constitutional standing because the relief they requested — monetary damages on behalf of their members — would require individualized proof. *Id.*

It is significant that in outlining this test for associational standing in *Warth*, the Court made clear that the standards it applied were *constitutional* rather than *prudential*. Later in *Hunt*, the Court took the constitutional test announced in *Warth* and, specifically citing *Warth*, enumerated its requirements: "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. Thus, it is clear that the *Hunt* test is a *constitutional* rather than *prudential* one. There is nothing in either *Warth* or *Hunt* which indicates that this Court believed any of the elements of the test to be anything other than constitutional.

Consequently, the issue which the Union urges support the grant of a writ of certiorari in this case — whether the third prong of the *Hunt* test is prudential or constitutional — is one that has long ago been decided by this Court. Given this Court's rulings in *Warth* and *Hunt*, there is no question but that the third prong of the *Hunt* test *is* constitutional and was correctly applied by the Eighth Circuit.

(b) The Union Is Not Exempt From Article III Standing Requirements Merely Because It Is The Statutory Representative Of Its Members.

The Union further argues that the Eighth Circuit erred "by assuming that the associational standing doctrine as stated in *Brock* and *Hunt* is fully applicable to a situation, such as the one here, where Congress has prescribed detailed procedures for appointing an entity as the representative of the interests of a class of individuals." (Petition at 20). The Union's argument appears to be in that it should not be required to establish constitutional standing as a part of its pleadings simply because it is a statutory representative under the National Labor Relations Act.

A similar argument was rejected by the Ninth Circuit in *United Union of Roofers, Waterproofers and Allied Trade No. 40 v. Insurance Corp. of America*, 919 F.2d 1398 (9th Cir. 1990). In that case, the Ninth Circuit, relying on the third prong of the *Hunt* test, affirmed the district court's ruling that a union plaintiff lacked standing to recover money damages for the unpaid wages of its members from a surety bond payment. *Id.* at 1399-1400. The union urged that it had "special representative obligations" to its members "that make it an appropriate association to sue for damages on behalf of its members." *Id.* The Ninth Circuit rejected this argument, holding, "Even assuming, *arguendo*, that a union does have a special representative duty to its members that distinguishes it from many other associations, there is absolutely no authority that such a factor would negate the required application of the test established in *Hunt*." *Id.* The court concluded, "[I]t is clear that individual Union members will have to participate at the proof of damage stage. There is no escaping the fact that the Union in this case cannot overcome the third hurdle placed before it by Supreme Court precedent." *Id.*

This Court has also refused to apply a "sliding scale" of

constitutional standing which would vary according to the claims asserted. *Valley Forge*, 454 U.S. at 484. In *Valley Forge*, the plaintiffs argued that because the establishment clause of the First Amendment was more "fundamental" than other constitutional clauses, the standard for determining whether plaintiffs had standing should be lessened. *Id.* This Court rejected that argument, holding that "[t]o the extent the Court of Appeals relied on a view of standing under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases, we reject that notion." *Id.* It also added that "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondent to invoke the judicial power of the United States." *Id.*

The Union urges this Court to grant its petition in this case in order to establish the principle that "a separate judicial inquiry" into standing is not necessary when the plaintiff is a statutory representative. The Union has not, however, pointed to any "principled basis" on which to create "sliding scale" of constitutional standing which varies according to the congressional status of the party asserting the claim. This Court has held repeatedly that Congress may not abrogate Article III's requirement that there be a case or controversy. *Lujan*, 504 U.S. at 560; *Allen*, 468 U.S. at 751; *Gladstone*, 441 U.S. at 91; *Warth*, 422 U.S. at 501; *Trafficante*, 409 U.S. at 209. Were the Court to ignore its precedent in this area and adopt the Union's reasoning, it would effectively eviscerate the requirements of Article III of the Constitution.

It is significant that the Union has no authority and can point to no basis for the granting of a petition for writ of certiorari to adopt the novel and unprecedented theory that it is not subject to the case or controversy requirement of Article III of the Constitution merely because it is the statutory representative of its members. Such a theory is directly contrary to this Court's

rulings and constitutes an inadequate basis for the granting of the Union's petition.

(c) The Eighth Circuit's Holding Is Not Inconsistent With This Court's Opinion In *Hoosier Cardinal*.

The Union argues finally that the Eighth Circuit's analysis is flawed because it is inconsistent with this Court's holding in *International Union, United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), in which this Court held that a union may sue under the Labor Management Relations Act for the monetary damages of its members under a collective bargaining agreement. (Petition at 23-24).

The Eighth Circuit's ruling is not, however, inconsistent with this Court's opinion in *Hoosier Cardinal*. As the Eighth Circuit recognized in its opinion, the claims in *Hoosier Cardinal* were made pursuant to the terms of a collective bargaining agreement, to which the union plaintiff was a signatory. 383 U.S. at 699. (App. at 8a). Thus the union in *Hoosier Cardinal* had standing because it was seeking "to vindicate employee rights under a contract the union had obtained," and because its interest in the case "implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract." *Id.* at 700. Here, the individual claims of its members which the Union pursued in its complaint were not brought pursuant to the collective bargaining agreement between the Union and Brown Shoe but under the statutory provisions of the WARN Act. There was no privity of contract and the rights of the union protected by the collective bargaining agreement were not implicated, as they were in *Hoosier Cardinal*. In accordance with the Court's holding in *Hoosier Cardinal*, the federal courts have held that individual employees do *not* have standing to enforce their Section 301 rights because they are not parties to the collective bargaining

agreement between the union and the employer. *Cleveland v. Porca Co.*, 38 F.3d 289 (7th Cir. 1994); *Katir v. Columbia University*, 15 F.3d 23 (2d Cir. 1994); *Martin v. Youngstown Sheet & Tube Co.*, 911 F.2d 1239, 1244 (7th Cir. 1990); *Vosch v. Werner Continental Inc.*, 734 F.2d 149, 154 (3d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985).

The law of standing set forth by this Court is clear and consistent. The Eighth Circuit's ruling was in harmony with the precedent of this Court, which it was bound to follow, as well as the holdings of the other federal courts of appeals. There is, therefore, no valid basis for the granting of the Union's petition for a writ of certiorari.

CONCLUSION

WHEREFORE, for these reasons, Respondent Brown Group, Inc. d/b/a Brown Shoe Company, respectfully requests that this Court deny Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In The Supreme Court of the United States

October Term, 1995

United Food and Commercial Workers Union Local 751,

Petitioner,

v.

Brown Group, Inc., d/b/a Brown Shoe Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. Brown Shoe seeks to pass this case off as one that turns on inept pleading, *viz.* "the Union's own failure to establish in its complaint its standing" (Opposition at 7) and the Union's failure to amend that complaint in a timely manner (*id.* at 18). According to Respondent, the Eighth Circuit's decision means only that *"this Union"* failed to allege a claim, not that "the provision of the WARN Act granting unions the right to sue was unconstitutional" (*id.*; emphasis in original).

But the precise claim alleged by the Union in its complaint is, as we demonstrated in the Petition, the claim expressly created by Congress. The WARN Act provides

that advance notice of certain plant closings must be given "to each representative of the affected employees" (29 U.S.C. § 2102(a)(1)), that an employer who violates this provision is "liable to each aggrieved employee" for back pay (29 U.S.C. § 2104(a)(1)), and that the "representative of employees . . . may sue" to "enforce *such* liability" (29 U.S.C. § 2104(a)(5); emphasis supplied). The Union's complaint here tracks these provisions as Congress wrote them.

It is therefore no answer to the Petition to suggest, as Respondent does, that the Union should have amended its complaint to seek "prospective relief" rather than money penalties. (Opposition at 18.) Not only did Congress expressly make money penalties the remedy for violation of the WARN Act's advance-notice-to-the-union provision, Congress provided that such penalties "are the *exclusive* remedies for any violation" of the WARN Act. 29 U.S.C. § 2104(b) (emphasis supplied).

Nor is it an answer to the Petition to suggest, as Respondent does, that the Union should "simply have amended its complaint to add as plaintiffs . . . individual employees." (Opposition at 18.) That is another way of stating that Congress can not do what the Legislature so plainly did in the WARN Act.

2. Brown Shoe eventually recedes from its claim that no constitutional question is presented to the claim that the Eighth Circuit's invalidation of part of the WARN Act presents "no fundamental constitutional question." (Opposition at 9.) According to Respondent, this case is controlled by the well-settled rule that "Congress may not eliminate the requirements of Article III" with regard to standing. (*Id.*)

But that rule merely frames the constitutional question here. The crux of the matter is whether "the requirements of Article III" include the requirement that to have standing a plaintiff must be seeking monetary relief that

inures to its direct financial benefit. And, Respondent's full dress argument that this Court's "associational standing" line of cases decide this question in its favor is trebly flawed. That line of cases points the other way and a host of court of appeals' decisions—in conflict with the Eighth Circuit decision in this case—so recognize.

First, this is a case. unlike the cases on which Respondent relies, in which the plaintiff has *itself* suffered a cognizable injury. The WARN Act provides that Brown Shoe must provide advance notice of a plant closing *to the Union*, and Brown Shoe is accused in the complaint of failing to provide that notice *to the Union*. Congress can, without transgressing Article III, "creat[e] legal rights, the invasion of which creates standing." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973).

The issue, then, is whether, having created a legal right, Congress may also create the kind of remedy for invasion of that right created in the WARN Act without running afoul of Article III. The Eighth Circuit held, and Brown Shoe now contends, that this remedy—backpay for employees—will not redress the alleged injury to the Union and the Union therefore does not have standing. (Opposition at 19-30).

As this Court recognized in *North Star Steel Co. v. Thomas*, 115 S.Ct. 1927, 1929 (1995), Congress intended the backpay awards as "penalties" for violation of WARN, presumably because Congress did not wish to authorize a remedy that would interfere directly with the right of employers to terminate operations but did wish to deter employers from doing so in violation of the Act's notice requirements.

This remedial scheme is not unique to the WARN Act, and has not before been thought to raise Article III difficulties. In *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), for example, the Third Circuit upheld the standing of an enviornmental group to seek civil money penal-

ties under the Clean Water Act which would be payable to an *environmental trust fund*. The Court stated that

> [w]here Congress has expressly granted a right of action and plaintiffs have shown "a distinct and palpable injury," plaintiffs "may invoke the general public interest in support of their claim." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The general public interest in clean waterways will be served in this case by the deterrent effect of an award of civil penalties. Penalties will deter both [the defendant] specifically and other . . . permit holders. Thus [plaintiff's] members' injuries may be redressed by a favorable decision in this case. [Citations omitted.] Under current constitutional requirements this plaintiff has standing. [*PIRG v. Powell Duffryn Terminals, Inc.*, 931 F.2d at 73.]

The Eighth Circuit's approach to standing here is in conflict with the approach to standing in *Powell Duffryn* and the cases cited therein.

The Eighth Circuit's decision is even more directly in conflict with this Court's decision in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). In *Hoosier Cardinal*, as here, a union brought suit to redress an injury *to itself* (in that case, the breach of a collective bargaining agreement to which the union was a party; in this case, the failure to provide the union with the statutorily prescribed notice) and the remedy sought in each case was money payments *for the employees the union represents*. The *Hoosier Cardinal* Court expressly held that the Union had standing to do so. 383 U.S. at 699-700.

Respondent would distinguish *Hoosier Cardinal* as a decision related to a claim for breach of a contract, rather than of a statutory notice provision. But no explanation is given as to why this distinction is of any relevance whatsoever for Article III *standing* purposes. In both instances, the salient point is that where a union suffers cognizable legal injury, Congress can provide for

a suit by the union that generates monetary relief to the employees the union represents as a remedy for the union's representational injury.[1]

Second, the associational standing cases Respondent cites, and relies on, "are a particular run of cases dealing with challenges to governmental actions by associations *with no particular entitlement to stand in the shoes of their members.*" *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1319 (7th Cir. 1992) (emphasis supplied). Here the WARN Act *does* provide a "particular entitlement" to the Union to bring this action.

As the Seventh Circuit recognized, "representative damages litigation is common—from class actions under Fed.R.Civ.P. 23(b)(3) to suits by trustees representing hundreds of creditors in bankruptcy to *parens patriae* actions by state governments to litigation by and against executors of decedents' estates." 954 F.2d at 1319. Whether the representative suit will be permitted turns on an examination of the representatives' asserted authority to bring the particular claim. Thus, *Amoco Cadiz*

---

[1] Respondent's contention that this case is distinguishable from *Hoosier Cardinal* because individual employees can bring suit directly under the WARN Act whereas "federal courts have held that individual employees do *not* have standing to enforce their [LMRA] Section 301 rights because they are not parties to the collective bargaining agreement between the union and the employer" (Opposition at 30), is based on a complete misreading of the law. Individual employees *can* bring suit for breach of a collective bargaining agreement under § 301. This Court so held in *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962), and expressly recognized in *Hoosier Cardinal* that the question whether an *individual* employee could bring suit under § 301 already had been decided in *Smith*. *See Hoosier Cardinal*, 383 U.S. at 700. The lower-court cases relied upon by respondent for the opposite proposition (see Opposition at 30), actually involve the entirely separate question of whether an individual employee has standing to overturn an arbitration award entered pursuant to the collective bargaining agreement.

permits a French trade syndicate to bring suit in federal court for money damages sought as compensation for its members because the law of France authorized such syndicates to act as representatives in such actions. 954 F.2d at 1321-22.

Similarly, in *Hoosier Cardinal*, this Court discerned Congress' intent that the union be authorized as the litigation representative from general doctrine regarding "the union's role in the collective bargaining process." 383 U.S. at 700.

And, as we have stressed, Congress' intent that a union be permitted to sue as representative of its members for violations of the WARN Act is clearly and plainly stated in the Act.

The Eighth Circuit's insistence upon analyzing this case under *Warth v. Seldin*, 422 U.S. 490 (1975), and other associational standing cases, and its concomitant refusal to recognize the significance of Congress' authorization of the Union to act as representative under the WARN Act, is therefore in conflict with *Hoosier Cardinal*, with the Seventh Circuit's decision in *Amoco Cadiz*, and with the many other representational standing cases cited in our Petition at pp. 20-21.[2]

Third, even if this case *were* properly analyzed under the framework established by the associational standing cases—and it is not—this Court has *not*, as Respondent contends, addressed whether the third prong of the *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) associational standing test is of *constitutional*, rather than *prudential*, origin. The supposedly

[2] Respondent's contention that "[t]he Eighth Circuit's reasoning is in harmony with a long line of federal decisions establishing that a union is not "the *general* litigating agent of its members" under federal labor laws (Opposition at 21; emphasis supplied, citations omitted), is unsound in its premise. The Union does not seek in this case to be a "*general* litigating agent," only to bring the specific claim that Congress has authorized the Union to bring.

dispositive passage from *Warth v. Seldin*, 422 U.S. 490 (1975)—cited and relied on by Respondent (Opposition at 25-26)—is, at best, ambiguous on this point:

> Even in the absence of an injury to itself, an association may have standing solely as the representative of its members. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. [422 U.S. at 511-12; citations omitted.]

The most natural reading of this passage is that the "constitutional requirement of a case or controversy" is satisfied by the demonstration of "actual injury", and that its final sentence provides *additonal, prudential* criteria for the courts in determining whether an association may be an "appropriate" representative of its members where no legislature has spoken to the question in establishing the underlying right.

We therefore end where our Petition ended—the manifest need for this Court to clarify the constitutional status of the *Hunt* test is amply demonstrated by the continuing conflict among the courts of appeals (see cases cited in Petition at 19-20) on the very issue that Respondent claims was decided by this Court 20 years ago.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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(6)

No. 95-340

Supreme Co
DEC 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751,

Petitioner,

v.

BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 25, 1995
CERTIORARI GRANTED OCTOBER 16, 1995

83 pp

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

No. 4:92-CV-1134

LOCAL 751 UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION,
as representative of the aggrieved employees,
Plaintiff

v.

BROWN GROUP, INC.,
Doing business as Brown Shoe Company,
Defendant

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/16/92	COMPLAINT w/attachments; # Summons Issued: 1 # Counts: 1 # Days to Respond: 20; jury demand (kec) [Entry date 06/17/92] [Edit date 06/18/92]
6/22/92	ACCEPTANCE/ACKNOWLEDGEMENT OF SERVICE by defendant Brown Group, Inc. on 6/19/92 (jwh) [Entry date 06/23/92]
7/29/92	MOTION by defendant Brown Group, Inc. to dismiss for lack of jurisdiction w/memo. (jwh) [Entry date 07/30/92]
8/31/92	RESPONSE by plaintiff Local 751 UFCW to motion to dismiss for lack of jurisdiction w/memo. [9-1] (jwh) [Entry date 09/02/92]
9/9/92	REPLY by defendant Brown Group, Inc. to response to motion to dismiss for lack of jurisdiction w/memo. [9-1] (jwh) [Entry date 09/10/92]

DATE	PROCEEDINGS
4/12/93	MEMORANDUM AND ORDER: by Honorable Edward L. Filippine granting motion to dismiss for lack of jurisdiction w/memo. [9-1] (cc: all counsel) (jwh)
4/12/93	ORDER by Honorable Edward L. Filippine terminating case w/o prej. (cc: all counsel) (jwh)
4/22/93	MOTION by plaintiff Local 751 UFCW to alter jgm., to amend jgm. (jwh) [Entry date 04/26/93]
4/23/93	MEMORANDUM by plaintiff Local 751 UFCW re: motion to alter jgm. [16-1], re: motion to amend jgm. [16-2] (jwh) [Entry date 04/26/93]
5/11/93	RESPONSE by defendant Brown Group, Inc. to motion to alter jgm. [16-1], to motion to amend jgm. [16-2] (jwh) [Entry date 05/13/93]
5/21/93	REPLY by plaintiff Local 751 UFCW to response to motion to alter jgm. [16-1], motion to amend jgm. [16-2] (jwh) [Entry date 05/24/93]
3/7/94	MEMORANDUM AND ORDER: by Honorable Edward L. Filippine denying motion to alter jgm. [16-1], denying motion to amend jgm. [16-2] (cc: all counsel) (kmb) [Entry date 03/15/94]
4/1/94	NOTICE OF APPEAL filed by plaintiff Local 751 UFCW re: the District Court decision; [21-1] fee: $105.00 (lal) [Entry date 04/06/94]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH DISTRICT

No. 94-1929

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 751,
as representative of the aggrieved employees,
Plaintiff-Appellant

v.

BROWN GROUP, INC.,
Doing business as Brown Shoe Company,
Defendant-Appellee

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/13/94	Civil Case Docketed. (lkl)
4/13/94	CERTIFIED copies notice of appeal, docket entries. [94-1929] and judgment of 3/7/94 from district court [422525] (lkl)
4/13/94	BRIEFING SCHEDULE: [94-1929] Method of Apndx due on 4/25/94; DR aplnt due on 4/25/94; Aplee DR due on 5/3/94; Joint Apndx due on 5/23/94; Aplnt brief due on 5/23/94; Aplee brief due on 6/22/94; Reply brief due on 7/6/94; (lkl)
4/25/94	DESIGNATION of record received from Appellant UFCW. [94-1929] (mel)
5/4/94	Motion to Amend Notice of Appeal with attached Memorandum in Support from Jerome A. Diekemper for Appellant UFCW. [94-1929] (lkl)

DATE	PROCEEDINGS
5/5/94	ORDER filed: granting document null [430442-2] Appellant Motion to Amend Notice of Appeal is hereby ordered taken with the case for consideration by the panel to which this case is submitted for disposition on the merits. [430784] (lkl)
5/6/94	DESIGNATION of record received from Appellee Brown Group. [94-1929] (mel)
5/31/94	MOTION of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Oil Chemical and Atomic Workers International Union (OCAWIU), the United Mine Workers of America, International Union, and the Guild/Sugar Law Center for Economic and Social Justice for leave to file amicus curiae brief on behalf of aplnt. [440955] w/service 5/24/94 (mel)
6/2/94	ORDER filed: Motion of International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW); Oil, Chemical and Atomic Workers International Union (OCAWIU); the United Mine Workers of America, International Union; and the Guild/Sugar Law Center for Economic and Social Justice for leave to participate as amicus curiae has been filed. Parties are notified that absent the filing of a formal objection within 10 days, the motion will be deemed as granted. [94-1929] [441020] (mel)
6/3/94	RECORDS received: Joint Appendix, consisting of 1 Volume(s) 3 copies. [94-1929] (mel)
6/10/94	RESPONSE of aplee, Brown Group, in opposition to amicus motion for leave to file amicus brief filed by UAW; Oil, Chemical and Atomic Workers; United Mine Workers and Guild/Sugar Law Center. [440955-1] [446035]. (mel)

DATE	PROCEEDINGS
6/15/94	ORDER filed: The motion of the UAW; Oil, Chemical and Atomic Workers; United Mine Workers and Guild/Sugar Law Center for leave to file an amicus brief is granted. Their amici brief is due June 30, 1994. Appellee's brief is due August 1, 1994. Appellee's objections to the motion are denied. The amici may participate in oral argument only to the extent appellant relinquishes a portion of its time. [440955-1] [446074] (mel)
6/16/94	BRIEF FILED—Brief of Appellant—UFCW—15 pgs—w/addendum—10 copies—w/service 6/16/94. Defects: SF [94-1929] [448326] (mel)
6/30/94	BRIEF FILED—Brief of Amicus-Curiae—UAW, OCAW, UMW, Guild/Sugar Law Ctr. on behalf of aplnt UFCW 19 pgs—10 copies w/service 6/29/94. [94-1929] [452464] (mel)
8/26/94	BRIEF FILED—Brief of Appellee—Brown Group. 43 pgs—w/addendum—10 copies—w/service 8/26/94. [94-1929] [475196] (cah)
9/22/94	BRIEF FILED—Reply brief—UFCW. 14 pgs—10 copies—w/service 9/22/94. [94-1929] [484257] (cah)
11/8/94	*SET FOR ARGUMENT*—December in St. Louis. [94-1929] (dgh)
12/14/94	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Pasco M. Bowman, Circuit Judge, James B. Loken, Circuit Judge, Andrew W. Bogue, District Judge, South Dakota, Visiting Judge. Kary L. Moss for Amicus Curiae Guild/Sugar Law Ctr., Amicus Curiae UMW, Amicus Curiae OCAW, Amicus Curiae UAW, Renee L. Bowser for Appellant UFCW. Michelle M. Cain for Appellee Brown Group. Rebuttal by: Bowser. RECORDED. [94-1929] (paw)

DATE	PROCEEDINGS
12/20/94	28(j) citation received and filed from Appellant UFCW TO COURT. [94-1929] [517580] (paw)
4/3/95	THE COURT: Pasco M. Bowman, James B. Loken, Andrew W. Bogue. OPINION FILED by Pasco M. Bowman PUBLISHED. [94-1929] [554700] (mls)
4/3/95	JUDGMENT: Pasco M. Bowman, James B. Loken, Andrew W. Bogue: The Judgment of the lower court is AFFIRMED in accordance with the opinion. [94-1929] [554712] (mls)
5/1/95	PETITION for REHEARING with suggestions for rehearing en banc. Filed by Appellant UFCW, w/service 5/1/95. TO COURT. [94-1929] (mls)
5/25/95	JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [566548-1] filed by UFCW. Petition for panel Rehearing is also denied. [94-1929] [575588] (mls)
5/1/95	MANDATE ISSUED [94-1929] (mls)
5/5/95	RECEIPT for Mandate. [94-1929] [580878] (mls)
9/1/95	U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on August 23, 1995. Supreme Ct. Case No.: 95-340 [94-1929] [615056] (mls)

[Filed Jun. 16, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:92CV01134ELF
Jury Trial Demanded

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751, AS REPRESENTATIVE OF THE AGGRIEVED EMPLOYEES,
Plaintiff,

v.

BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Defendant.

PLAINTIFF'S COMPLAINT AGAINST DEFENDANT FOR VIOLATION OF THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Plaintiff United Food and Commercial Workers Union Local 751 (hereinafter identified as "Local 751" or the "Union"), through counsel, complains against Defendant Brown Group, Inc. d/b/a Brown Shoe Company (hereinafter identified as "Brown Shoe") and shows the court the following:

JURISDICTION

1. This is an action for monetary damages against Brown Group, Inc. d/b/a Brown Shoe Company for its failure to provide wages and benefits as required under the Worker Adjustment and Retraining Notification Act ("WARN"), Title 29, U.S.C. §§ 2101-2104. Jurisdiction for this complaint is based on Title 28, U.S.C. § 1331 and Title 29, U.S.C. § 2104(a).

2. Pursuant to Title 29, U.S.C. § 2104(a)(5), venue lies in the Eastern District of Missouri, Eastern Division because the employer transacts business in the District.

PARTIES

3. Plaintiff United Food and Commercial Workers Union Local 751 is an unincorporated association whose address is P.O. Box 89 in Dixon, Missouri 65459.

4. Defendant Brown Group, Inc. d/b/a Brown Shoe Company is a corporation incorporated in the state of New York with its principal place of business in St. Louis, Missouri at 8300 Maryland Avenue. At all times material to the events at issue in this complaint, Defendant Brown Shoe operated a shoe manufacturing plant on West 5th in the town of Dixon in Pulaski County, Missouri 65459. Defendant is an employer as defined by § 2101(a)(1) of the WARN act.

CAUSE OF ACTION

5. Plaintiff is the certified exclusive bargaining representative of the aggrieved Brown Shoe employee on whose behalf the relief prayed for herein is sought and has been said employees' representative at all times material to the events at issue in this complaint. Recognition of Plaintiff as the employees' bargaining representative is embodied in the Labor Contract, Brown Shoe Company and Footwear Division, United Food and Commercial Workers International Union, Local 751, AFL-CIO & CLC, dated September 20, 1990 to August 27, 1993 which is attached hereto as Appendix A. Plaintiff is an employee representative as defined by § 2104(a)(4) of the WARN Act.

6. This action is filed by Plaintiff on behalf of 277 employees of Defendant's Dixon plant who were represented by Plaintiff on January 17, 1992, the date on which Defendant provided Plaintiff written notice of the permanent closing of the Dixon plant pursuant to § 2102(a) of the WARN Act. On January 17, 1992, the 277 employees were affected employees under § 2101(a)(5) of the WARN Act.

7. By letter dated January 17, 1992, attached hereto as Appendix B, Defendant mailed a written notice to William R. Treece that the Dixon plant would be permanently closed and result in the discharge of 277 employees represented by Plaintiff. In that letter, the Defendant stated that the displacement of employees would begin on March 20, 1992. The notice to William R. Treece was not in compliance with § 2102(a)(1) of the WARN Act because William R. Treece is not the exclusive representative of the affected employees.

8. On January 31, 1992, Defendant began laying off the Dixon employees represented by Plaintiff and continued laying off employees during February and March, 1992 without regard to the requirement of the WARN Act to delay the layoff of the employees for sixty days following the statutory notice. The cumulative impact of these layoffs constitutes a plant closing under § 2101 (a)(2) of the WARN Act which violates § 2102 of the WARN Act.

9. Assuming the January 17, 1992 notice was valid, most of the employees represented by Plaintiff experienced employment loss as defined by § 2102(a)(6) of the WARN Act prior to March 17, 1992, the expiration date of the sixty-day notice period and therefore are aggrieved employees under the WARN Act entitled to relief as set forth in § 2104 of the Act. The aggrieved employees are identified on the list attached hereto as Appendix C to this complaint. If no valid notice was given, all 277 employees are aggrieved employees entitled to relief under the WARN Act.

RELIEF

10. WHEREFORE, Plaintiff demands:

a) That Defendant pay each of the aggrieved employees backpay and fringe benefits, including but not limited to, vacation pay, medical expenses, and contri-

butions to the pension plan, for 60 days or for each day of each employee's employment loss which occurred prior to the expiration of a sixty-day period after the employer validly served written notice of permanent closing on the employees' representative;

b) That Plaintiff recover from Defendant the cost of this action, including reasonable attorneys' fees; and

c) That Plaintiff recover such other and further relief on its behalf and that of the aggrieved employees as may be proper.

Dated: June 12, 1992.

Respectfully submitted,

/s/ Renee L. Bowser
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APPENDIX A

LABOR CONTRACT

BROWN SHOE COMPANY

AND

FOOTWEAR DIVISION, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO & CLC

LOCAL NO. 751

Dixon, Missouri

September 20, 1990 - August 27, 1993

AGREEMENT

This Agreement entered into by and between the Brown Shoe Company (a member company of Brown Group, Inc.), hereinafter referred to as the "Company", for its factory at Dixon, Missouri, and the Footwear Division, LOCAL 751, as chartered by the United Food and Commercial Workers International Union, hereinafter referred to as the "Union," WITNESSETH THAT:

NOW, THEREFORE, in consideration of their mutual promises the parties hereto agree as follows:

ARTICLE I—RECOGNITION

SECTION 1. This Agreement pertains only to the employees or those who may be employed by the Company in this plant and to the Company and its relations with the employees only insofar as they directly concern the operation of the aforementioned plant with the exception of: Office and Clerical Employees, Commissary Clerks, Upper Leather Stock Clerks, Lunchroom Employees, Factory Nurse, Foremen, Foreladies, Supervisory Trainees, Assistant Foremen, Instructors, Chief Engineer, Assistant Engineer and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

Any Upper Leather Stock Clerk or Commissary Clerk who is at present a member of the Union shall be permitted to retain such membership. When, however, any such individual is separated or transferred to other work, the job thus vacated shall at such time be removed from the bargaining unit.

SECTION 2. The Company recognizes the Union as the exclusive collective bargaining agency subject to the provisions of the National Labor Relations Act for all employees of the *Dixon, Missouri* plant, and agrees to negotiate only with the Union on all matters relative to collective bargaining affecting these employees.

SECTION 3. All employees shall be required as a condition of employment to become members of the Union thirty (30) days after the date of their employment or the effective date of this Agreement, whichever is later, and shall be required to remain members in good standing so long as they shall be employed by the Company.

The provisions of this Section shall be effective only if permitted by State Law.

SECTION 4. The Union shall immediately after the execution date of this Agreement furnish the Company with a notarized list of its members in good standing as of that date and shall thereafter advise the Company at monthly intervals of its new members.

On receipt of written authorization from an employee the Company will during the term of this Agreement or any extension or renewal thereof deduct from the employee's pay once each calendar month the amount of accumulated Union dues at the rate certified to the Company by the Union and also such initiation or reinstatement fees as are authorized during the current month.

ARTICLE II—HOURS

SECTION 1. The present working plan of the factory shall continue in effect. This plan of work shall be between the hours of 7:00 a.m. and 4:00 p.m. daily, unless on certain operations the regular starting and stopping times are earlier or later than those hours, or unless the duration of the lunch period is changed by local agreement confirmed by written memorandum. This plan shall apply to all employees not specifically excluded from the bargaining unit as defined in Article I, Section 1 of this Agreement.

The work week shall be considered as beginning on Monday. All work over eight (8) hours in a day or any work performed on Saturday or a holiday, or in hours beyond the regular quitting time or before the regular

starting time for each operation shall be compensated by the payment of time and one-half the regular rates.

All work performed on a seventh (7th) consecutive work day shall be paid at the rate of double time. An employee who is not regularly required to work on Sunday will be paid double time for all work he performed that day.

Watchmen whose regular schedule of work includes Saturdays or Sundays or more than eight (8) hours per day shall receive overtime payments only for those hours worked in excess of their regularly scheduled work day or in excess of forty (40)) hours a week.

SECTION 2. The Company will not change an employee's working hours in an unreasonable or unnecessary manner in order to avoid overtime payment and will not permit an employee to begin work before the regular starting time or continue work after the regular closing time of the other employees on the same work unless agreed to by the Foreman and Shop Steward of the department.

Where changes in operation or construction require same, the Company may change permanently the regular hours of work of the employees on any particular operation without being required to pay overtime for the hours thus worked before or after the regular factory working hours.

SECTION 3. Employees shall not be required to perform overtime unless notified by noon the day the overtime is to be worked. Employees shall not be required to work Saturday unless notice is given before noon Friday; furthermore, no employee who has been notified that he will be required to work on Saturday shall be required to work beyond his regular quitting time on the preceding day, except in a case of extreme emergency, which shall be discussed in advance with the Union.

Maintenance employees may be notified after 12:00 noon that overtime will be worked when a machine breakdown occurs which will affect production if not immediately repaired.

Employees who are responsible for loading and unloading trucks may be notified after 12:00 noon that overtime will be worked if such overtime is necessitated at the end of the employees' shift by the late arrival of a truck.

When the Company has notified operators of intent to work overtime on any regular work day, it may cancel such overtime by giving notice not later than one hour before the regular quitting time of such employees. Failure to give such notice of cancellation within the time specified shall entitle the employees involved to one-quarter hour's wage at straight time.

SECTION 4. All production work performed during the lunch period by employees in the bargaining unit shall be on a voluntary basis. All such work shall be paid for at one and one-half (1½) times regular rates. The lunch period may be reduced in duration by local agreement confirmed by written memorandum.

After the regular quitting time of an employee on the Friday workday that precedes vacation closedown, all overtime shall be on a voluntary basis, except in the case of an extreme emergency which same shall be discussed by the Company and Union prior to overtime work.

SECTION 5. No work in excess of eight (8) hours shall be performed on Saturday unless such additional work is agreed to by the Union and each operator is given the right to refuse same.

SECTION 6. When it becomes necessary for a reduction in the daily schedule of a factory or reduction in working days per week, the Company shall so advise

the Local Union and, if possible, indicate the probable duration of same.

SECTION 7. When it is necessary for a department or segment thereof to work overtime, the Company shall have available for such overtime period whatever number of experienced back shoe runners as are required to handle the production.

SECTION 8. Rest periods totalling thirty (30) minutes per day shall be granted to conveyor line employees. Each factory shall be given the option of continuing its present schedule of rest periods or establishing a schedule consisting of two (2) ten (10)-minute rest periods in the forenoon and one (1) ten (10)-minute rest period in the afternoon.

SECTION 9. Operators on jobs where damage could result to work in process if left uncompleted (such as, but not limited to, pullover, sidelast, sole lay and heel seat last) can be required to work overtime, up to a maximum of one hour, on the last working day preceding the vacation closedown, the day before a holiday, or the last working day preceding a weekend which includes a holiday on Monday, provided that the Company has taken precautions to see that the operations controlling these jobs are discontinued in time to normally permit these operators to finish work at their regularly scheduled time.

ARTICLE III—HOLIDAYS

SECTION 1. The Company shall pay eight (8) hours compensation for the following unworked holidays:

Labor Day	Monday, Sept. 3, 1990	Monday, Sept. 2, 1991	Monday, Sept. 7, 1992
Veteran's Day	Sunday, Nov. 11, 1990	Monday, Nov. 11, 1991	Wednesday, Nov. 11, 1992
Thanksgiving	Thursday, Nov. 22, 1990	Thursday, Nov. 28, 1991	Thursday, Nov. 26, 1992
(Day After Thanksgiving)	Friday, Nov. 23, 1990	Friday, Nov. 29, 1991	Friday, Nov. 27, 1992
Christmas Day	Tuesday, Dec. 25, 1990	Wednesday, Dec. 25, 1991	Friday, Dec 25, 1992
(Day Before Or Day After Christmas)	Monday, Dec. 24, 1990	Tuesday, Dec. 24, 1991	Thursday, Dec. 24, 1992
New Year's Day	Tuesday, Jan. 1, 1991	Wednesday, Jan. 1, 1992	Friday, Jan. 1, 1993
Good Friday	Friday, March 29, 1991	Friday, April 17, 1992	Friday, April 9, 1993
Memorial Day	Monday, May 27, 1991	Monday, May 25, 1992	Monday, May 31, 1993
Independence Day	Thursday, July 4, 1991	Saturday, July 4, 1992 (Observe Friday, July 3, 1992)	Sunday, July 4, 1993 (Observe Monday, July 5, 1993)

Any factory which has multi-shifts will be scheduled locally.

In order to be eligible to receive such holiday pay, an employee hired after August 30, 1986, must have completed the probationary period (Article VI, Section 11) prior to the occurance of the holiday.

SECTION 2. The amount of holiday pay for each individual shall be computed by multiplying by eight (8) his straight time hourly average for the three weeks prior to the week in which the holiday occurs. Those employees who did not attain earnings in each of the former three weeks will be governed by the earnings computation outlined in the miscellaneous section of this Agreement.

SECTION 3. An employee temporarily laid off or on medical or personal leave of absence at the time a holiday occurs shall be paid said holiday benefits providing he has worked within the thirty (30) calendar days preceding the holiday and returns to work within the thirty (30) calendar days subsequent to the holiday. (An employee absent from work on the day before or the day after the

holiday for personal reasons must have been excused by the Foreman or suffering from bona fide illness in order to be eligible for holiday benefits.)

Employees will not be required to work beyond their regular quitting time on the calendar day immediately preceding a holiday.

SECTION 4. All overtime beyond regular hours on the Friday preceding a holiday occurring on Monday, and on the Saturday immediately following a holiday occurring on Friday, will be on a voluntary basis, except for those jobs where damage could result to the work in process as specifically enumerated under the Hours section of this Agreement.

ARTICLE IV—WAGES

SECTION 1. The present wage classifications and rate schedules (including sample extras) shall continue in effect as the standard wage classifications and wage schedules except as hereinafter provided.

(A) General Increases. Effective January 27, 1991, $.20 per hour will be added to the piece and hourly rates, with the addition incorporated into piece rates based on the line average of the particular job.

Effective January 26, 1992, an additional $.20 per hour will be added to the piece and hourly rates as above.

Effective January 24, 1993, an additional $.10 per hour will be added to the piece and hourly rates as above.

Effective June 20, 1993, an additional $.10 per hour will be added to the piece and hourly rates as above.

The present $.40 per hour clock card add-on remains as an add-on.

(B) Guaranteed Minimum. The factory guaranteed minimum will be the current Federal minimum wage.

(C) Wage Progression for Hourly Paid Workers. Hourly paid workers shall progress from minimum to the maximum of the rate range applicable to the job at a rate of five (5) cents per hour increase every four (4) weeks until the maximum has been reached. This shall not prevent the Company from paying a higher rate than provided in this paragraph if justified by the ability of the individual employee. Equal wages shall be paid for equal work.

SECTION 2. If the parties hereto by negotiation determine that any standard wage classifications or rate schedules are incorrect, insufficient or excessive, than such wage classifications or rate schedules shall be adjusted either by negotiation or arbitration, and the revised wage classifications or rate schedules shall become the standard wage classifications or wage schedules replacing those formerly in effect. In the revision of existing rates on regular jobs or the establishment of rates on new jobs, the following factors shall be considered: (a) comparative importance of the job, (b) amount of skill required, and (c) time required to attain such skill.

Such increases shall be retroactive to the date complaint was first presented in writing to the Plant Manager.

SECTION 3. In the event that at any time either the Union or the Company feels that changes in the Company's competitive or economic position justifies a different general level of wages in the plant, it may, by written notice, signify its desire that all or certain wage classifications or rates be changed and the matter then shall be negotiated. If, as a result of consideration of such notice, it is determined by negotiation or arbitration that any or all standard wage classifications or rates should be changed, such wage classifications or rates shall be adjusted, and the revised wage classifications or rates shall become the standard wage classifications or rates in place of those formerly in effect. Payment on a revised basis

shall start on the date mutually agreed upon, or if a date cannot be agreed upon, shall become effective thirty (30) days after written notice was served by the complaining party that a change was desired.

SECTION 4. (A) Temporary Transfers to the Advantage of the Company. Any employee transferred temporarily from his regular work to other work for reasons which are to the advantage of the Company will be guaranteed his hourly average earned on his regular job from the time he leaves his regular job until the time he returns thereto or the average hourly rate earned during the period of his transfer by operators on the job to which transferred, whichever is greater; provided that this shall apply only to employees who have more than six (6) weeks' experience on the job to which transferred. If such experience is lacking, the transferee shall be guaranteed his hourly average from his regular job for all hours worked on the temporary assignment.

Any employee required, for reasons to the advantage of the Company, to do work temporarily transferred from its regularly assigned position, shall be guaranteed his hourly average on his regular job during the period of such transfer.

Wages earned on temporary work shall not be used in computing an employee's three-week average.

The Company reserves the sole right to select employees for temporary transfers. Any employee selected for a temporary transfer for Company convenience shall be required to perform the work assigned to him.

(B) Temporary Transfer to the Advantage of the Employee. When no work is available on his own job, an employee may accept temporary employment on other jobs if available to him, in which cases he shall be paid at the piece work rate applicable to the temporary job but not less than his personal minimum, whichever is

greater, for all time spent on such temporary job or be permitted to leave the factory.

SECTION 5. (A) Learning Time. Wage classifications and rate schedules on new and changed operations shall be established by the Company. During the first one hundred twenty (120) hours of work on new or changed operations the operator shall be guaranteed his hourly rate based on the average obtained from the previous three (3) weeks' earnings. At the end of the one hundred twenty (120)-hour period the operator shall be paid on a piece work basis unless the General Superintendent agrees that the one hundred twenty (120)-hour period should be extended.

All job descriptions on all new or changed operations shall be shown as soon as issued to the Shop Steward and shall be initialed by him.

When a new job, a new machine, or a new method is introduced into the factory and, after a reasonable learning period, the operators thereon fail to reach their former line average, the Company and Union shall make a joint investigation to determine the cause of such failure.

(B) Non-Challengeability of Rates. Any wage schedule or formula for computing piece rates on individual patterns which has been in effect for as much as six (6) months may not be challenged by either party. The only challenge which may be made is to the correctness of the piece rate computed from said schedule or formula.

However, if the line average of experienced operators for four (4) consecutive weeks falls twenty percent (20%) below the line average of the experienced operators for the previous season, then the fact that the rate on a specific pattern was figured from an established schedule shall not be a bar to an arbitration award on that specific pattern.

"Experienced operators" shall mean the operator has six (6) months or more experience on the job.

A clerical error in computing a piece rate from a schedule shall be subject to correction whenever discovered. The corrected rate will become effective on the date of correction.

Erroneous or misapplied rates on patterns may be corrected by the Company for up to six (6) months after being set. If the Company discovers the misapplication after that period, it must notify the operators of such mistake. If the Company fails to notify operators and a new pattern comes in which involves the identical work on that operation of the previous pattern, then the old erroneous rate must be paid until the pattern is permanently removed.

The misapplied rate continues on the original pattern. Changes will be made only on a new pattern after proper notification.

(C) Establishment of New Standard Wage Classifications. If any new wage classification or rate established by the Company and objected to by the Union within ninety (90) days after establishment is revised as the result of negotiations or arbitration, the revised wage classification or rate shall become the standard wage classification or rate and payment on the revised basis shall become retroactive to the time of the establishment of the original basis.

(D) Issuance and Challenge of Rates. The Foreman of each department shall show to the Shop Steward of his department all piece rate and hour rate changes and piece rates applicable to new patterns and/or method changes as soon as he receives same from the factory office. The Steward will initial such changes indicating that he has been advised of same.

No rates will be issued to the operators on operations in the Pre-Fitting and Fitting Departments on which rates

are computed from a schedule or formula until issued by the Labor Cost Analysis Department. The employee's three-week straight time average will be paid until rates are issued from the Clayton office.

Fifteen (15) working days must follow the introduction of a new pattern or method before a grievance may be filed, and at least some work on such pattern or method must be performed on each of five (5) days. The fifteen (15)-day period will be extended until work has been scheduled on the fifth day, after which a grievance may properly be filed.

Whenever the accuracy of a rate is questioned by the operators within six (6) months of the time it was issued, and such rate is found to be in error, then backpay will be made, where applicable, from the date the pattern entered production or the rate was set, whichever is the later, and such backpay will be made regardless of whether a grievance was filed questioning the rate.

SECTION 6. Reporting Time. Each time an employee is required or permitted to report for work during any day, such employee shall be given at least two (2) hours employment or paid for same at his average hourly rate provided he remains in the plant for at least two (2) hours and is available for work unless excused. This provision shall not apply when work is unavailable because of work stoppage, general power failure, cyclone or other conditions beyond the control of the Company.

For overtime work on Saturday, if reporting time must be paid, it will be at the rate of time-and-one-half.

Pursuant to the provisions of the foregoing, an employee who is called to work at the regular starting time of the factory shall be guaranteed his hourly rate for the first two (2) hours of waiting time. If he is required to wait for the first two (2) hours of work, he shal be paid at his average for the entire two (2)-hour period. In the event, however, that work reaches him before the expiration of the first two (2) hours, he shall be paid for the

full amount of time intervening between the regular starting time of the factory and the time work reaches him. Where work is available at the regular starting time but its flow through a given operation ceases within the first two (2)-hour period, the reporting time guarantee will be superseded by the waiting time provisions of this contract.

When an employee has completed all the work before him or can see that he will be completely out of work by 12:00 noon, he shall not later than 11:45 a.m. so advise his Foreman or supervisor. Under such circumstances, unless the employee is told that he is not to report at his regular starting time that afternoon, the Company agrees that it will guarantee him two (2) hours of work or pay for same during the afternoon shift.

An employee who wishes to return to work after absence caused by illness or other personal reason shall be required to notify his Foreman not later than 3:00 p.m. of the day preceding his intended return to work. Failure to give such notice shall deprive the employee of the right to employment on the day of his return unless such immediate employment is for the convenience of the Foreman. The foregoing shall not apply when the absence is for only one (1) day or less.

SECTION 7. Experimental Operations. Operators shall be paid their average when the Company is experimenting or when new patterns are introduced until the piece rate thereon has been established. The hourly average will be paid in either case for all time spent on that particular work. Such guaranteed payments shall be approved by the Foreman at the end of each day.

SECTION 8. Learning Time Payment to Promoted Employees. Promoted employees while learning new operations shall be guaranteed one hundred percent (100%) of the hourly average on the job from which they transferred. This guarantee shall be effective for the first one hundred twenty (120) hours that the employee is on the new job.

SECTION 9. Machine Breakdown Payments. In the event an operator is compelled to be without work longer than a total of thirty (30) minutes because of machine breakdown, he shall be paid his hourly average for all succeeding time during that particular day which results from machine failure. The thirty (30) minutes' waiting time shall begin from the time the employee notifies his Foreman. At the end of the thirty (30)-minute period, the operator shall have the option of remaining on the job without guaranteed wages or of leaving the plant. In the event an operator is authorized by his Foreman to do work on his own machine ordinarily done by the plant or department machinist, he shall be paid his average hourly rate for such work.

The Foreman shall keep a written record of all time the employee reports he is out of work pursuant to the provisions of this Section.

SECTION 10. Waiting Time Payments. If during the forenoon an operator is required to be without work for more than twenty (20) minutes consecutively, he shall be paid at his hourly average for waiting time beyond the twenty (20) minutes of the first occurrence, or be permitted to leave the factory. The twenty (20) minute period shall be computed from the time the employee reports to his Foreman that he is without work. If the Foreman is not on the floor, it will be considered valid notice if the employee notifies the Assistant Foreman, or in the case of the Fitting Room, the Floor Lady of the section, that there was no work available, and the Assistants will be responsible for advising the Foreman that such a report had been made by the employee as soon as possible. (In the event there has been a twenty (20) minute waiting period, all subsequent waiting time in the forenoon shall be paid for on a cumulative basis.)

The foregoing procedure shall apply in like manner to all work performed after noon of any day. In order to be eligible for compensation, an operator must report to his

Foreman not only at the time he finds he is without work, but also after his required waiting period has elapsed.

Whenever the total "down time" on a conveyor line, exclusive of regularly scheduled rest periods, exceeds forty-five (45) minutes per day, each employee working on said line shall be paid at his hourly average for all "down time" in excess of the aforesaid forty-five (45) minutes.

Layoffs shall not be made nor any employee sent home on the basis of seniority. No waiting time shall begin and no operator shall be sent home as long as there is any work ahead of any operator on the particular job. Either all or no employees shall be sent home or paid their average hourly earnings in the event there is a stoppage in the flow of work to their operation. When an operator reports he is out of work, the Foreman shall decide at the expiration of the required waiting period whether the employee shall be sent home or kept on the job.

The Foreman shall keep a written record of all time the employee reports he is out of work pursuant to the provisions of this Section.

SECTION 11. Payment for Attending Company Meetings. Whenever an employee shall lose time from work as the result of a meeting called by the Company, he shall be paid at his hourly average for such lost time. This provision shall not apply to time spent by an employee in the presentation of grievances to the Company.

SECTION 12. Payment for Jury Service. Employees called for jury service shall be reimbursed by the Company for the difference between any fees received for said service and the earnings they would have received had they been available for work. Reimbursement shall cover time spent in service and in the collection of fees for said service. Employees are expected to work full time when not actually in court or doing something in connection with such service.

SECTION 13. Payment for Service at Elections or Registrations. Employees called for service as judges, clerks or deputies at elections and registrations will be paid by the Company whatever sum, if any, in addition to the money they receive for that service which is necessary so that there will be no loss of earnings because of such service.

SECTION 14. Bereavement Pay. In case of death in the immediate family, as defined, employees will be paid twenty-four (24) hours' pay at their regular rate of pay, exclusive of overtime, and will be allowed time off not to exceed twenty-four (24) scheduled hours. An employee may, where necessary, take additional time at his own expense.

An employee who must be absent from the factory to care for a dying relative in the immediate family, shall be paid the Bereavement Pay specified in this Section.

No such payment shall be paid for any period which occurs while an employee is on layoff, or on personal or medical leave of absence or for any time for which the employee received vacation benefits.

"Immediate family" as used in the foregoing, is defined as "spouse, child, parent (or, in the alternative, step-parents if the employee was raised in that household), brother or sister, parents-in-law, and grandparents" who have been in loco parentis to an employee.

SECTION 15. Payment for Serving at Military Funeral. Any employee, a member of a military organization, who is requested to serve as a member of an honor guard at a military funeral shall be compensated for actual time lost while serving in such capacity.

SECTION 16. Shift Premium. All production worked performed on a second shift shall be subject to a premium of seven and a half cents ($.075) per hour and such work performed on a third or fourth shift subject to a premium of ten cents ($.10) per hour.

SECTION 17 Power Failure. In the event of an outside power failure, the Company will require the operators to remain in the factory no longer than forty-five minutes.

In the event of a power failure in the plant, the Company will mark the "104 Records" of the operators involved to indicate the duration of the power failure so that if the operator's average will be used for some purpose, such time will be deducted for the purpose of computing the individual's average.

SECTION 18. Payment to Injured Employee. If an employee is injured in the factory and is required by the First Aid Attendant to report directly to a hospital or doctor's office outside the factory for treatment, then such time as the employee is absent from his job during that day will be paid for by the Company at his average if he promptly returns on that day to the factory from the doctor's office or hospital after such treatment.

SECTION 19. Operators Authorized to Train Employees. Operators will be guaranteed their average when they are authorized to train other employees if the training involves other than observation.

ARTICLE V—VACATIONS

SECTION 1. Vacation Period:

(A) The Company shall grant time off for a summer vacation period to all eligible employees as follows:

1991: June 28, July 1, 2, 3, and 5
1992: June 26, 29, 30, July 1, and 2
1993: July 2, 6, 7, 8, and 9

(B) The Company shall grant time off for a winter vacation period to all eligible employees as follows:

1990: December 21, 26, 27, 28, and 31
1991: December 23, 26, 27, 30, and 31
1992: December 23, 28, 29, 30, and 31
1993: December 22, 27, 28, 29, and 30

(C) Time off during the summer and winter vacation periods will be granted unless special provisions for a vacation period exist at a specific facility.

SECTION 2. Eligibility Requirements, Vacation Entitlement, and Payments: (A) Vacation Eligibility: To be eligible for vacation payment in any calendar year, an employee must have completed one year of employment and must have performed 500 hours of compensated service during the calendar year in which the vacation falls.

(B) Vacation Entitlement: Employees who have met the length of employment requirement and who have performed the 500 hours compensated service required for vacation eligibilty shall be entitled to vacation payment according the following schedule:

1. Employees who complete one year's employment shall be entitled to one week's vacation pay during that calendar year and thereafter.

2. Upon completing four years' employment, employees shall be entitled to a second week's vacation pay during that calendar year and thereafter.

3. Upon completing ten years' employment, employees shall be entitled to a third week's vacation pay during that calendar year and thereafter.

4. Upon completing twenty years' employment, employees shall be entitled to a fourth week's vacation pay during that calendar year and thereafter.

(C) Vacation Payment:

1. Employees who are entitled to vacation pay at the time of the summer vacation period shall be paid all of their vacation pay at that time, except that employees entitled to a second, third, or fourth week may elect instead to be paid for those weeks, or some of them, at the time of the winter vacation, or at the time taken off, by making written request for such payment to the Office Manager

at least ten working days before the start of the summer vacation period.

2. Employees not eligible for vacation payment at the time of the summer vacation period wil receive vacation payment due at the time of winter vacation if they have become eligible at that time.

3. Employees not eligible for vacation payment solely due to their failure to fulfill the 500 hours of service requirement at the summer vacation period will receive their vacation payment at the next regular pay period after they *do* meet the 500 hours requirement, if requested by them.

4. Eligible employees, whose anniversary date occurs after payment is made at the winter vacation, will receive their vacation payment at the next regular pay period.

SECTION 3. Vacation Benefits for Inductee into Military Service: In the event any employee otherwise eligible to receive a vacation with pay during the calendar year is inducted into military service before vacation compensation for which he is eligible has been paid to him, he shall receive, at the time of his induction, the vacation payment due in lieu of vacation time off. A former employee of the company returning to work after service in the Armed Forces shall receive vacation benefits due for the calendar year of his return without regard to hours of actual service performed during *that* calendar year and with the understanding that time spent in military service shall be added to accumulated company service for the purpose of determining vacation entitlement.

SECTION 4. Vacation Benefits for Employees Separated from the Payroll for Various Reasons:

(A) An employee who resigns, is laid off permanently, or is discharged, shall receive at the time of his separation, payment in lieu of vacation commensurate with his length of service for the calendar year in which his separation occurred, only if he has completed at least 500 hour of active service during that calendar year.

(B) Employees who are temporarily laid off or on leave of absence shall be paid their entire vacation entitlement at the time of the first vacation period after the commencement of their layoff or leave of absence, provided they have completed the 500 hours requirement specified in 2(A). Such employees who are not eligible for vacation at the time of the summer vacation period may become eligible for vacation payment, or, in the case of those who would reach their 4th, 10th, or 20th year of service, for an additional week's vacation payment, at the winter vacation period if they have completed their 500 hour requirement by that time. Such employees whose anniversary date occurs after payment is made of the winter vacation, will receive their vacation payment at the next regular pay period. Employees who receive such vacation payment shall not be entitled to any other payment from the weekly indemnity plan, unemployment compensation benefits, or workers' compensation payment covering the same weeks.

(C) An employee who retires under the Negotiated Pension Plan, and is qualified to receive immediate benefits therefore, shall receive vacation pay for the calendar year in which the retirement takes place, in accordance with his length of service at the time of his retirement without regard to the number of hours of service in the new calendar year.

SECTION 5. Method of Computing Vacation Benefits. Vacation pay for those employees who are entitled to one (1) week's benefits shall be computed by multiplying the number of hours in the average work week by the straight time hourly average of the employees. The average scheduled work week shall be determined by averaging the hours actually worked by all factory employees in the fifty-two (52) weeks immediately preceding computation of vacation benefits. The average hours for each

of the fifty-two (52) weeks and the composite average for the year shall be posted prior to computation of vacation benefits. In computing the average work week, any week in which the plant was closed for the observance of a national holiday shall be considered as a forty (40)-hour week.

The straight time hourly average of the individual employee shall be determined by dividing the total earnings at his regular rate (exclusive of overtime) by hours worked by the individual in a three (3)-consecutive-week period during which the factory work has been normal. Such three (3)-week period is agreed upon to be subsequent to the preceding January 1st. In the event the factory management and the Local Union are unable to agree upon what shall constitute a normal three (3)-week period, the matter shall be referred to the Executive Offices of the Company and the Regional Office of the Union. If an employee did not work all of these weeks, the average will be based on the weeks actually worked, except that if the total hours worked during this period were less than sixty, earnings during a sufficient number of former weeks will be used up to and including the week that will bring the total time worked to a minimum of sixty hours.

The amount of benefits for each worker shall not be less than forty (40) hours' pay for those entitled to one (1) week's vacation, nor more than forty-eight (48) hours' pay, regardless of the average hours worked by the factory during the preceding year.

Vacation pay for employees entitled to two (2) weeks' benefits shall be determined by multiplying the one (1) week's benefits by two (2); and vacation pay for the employees entitled to three (3) weeks' benefits shall be determined by multiplying the one (1) week's benefits by three (3); and vacation pay for employees entitled to four (4) weeks' benefits shall be determined by multiplying the one (1) week's benefits by four (4).

Vacation benefits shall be paid to hourly workers as well as piece workers, based on earnings during the three (3) weeks' period used for the computation of individual averages.

ARTICLE VI—SENIORITY

SECTION 1. Transfers Within a Department. When an operator is transferred within a department to another operation or job within that department on which he has no previous experience, his seniority on his new job begins the date of the transfer. His seniority on any former job or jobs is still in effect. No employee shall be permitted to acquire additional listing on his seniority card because of any reason other than promotion or bidding.

SECTION 2. Transfer Between Departments. When an operator is transferred to another department, his seniority in the new department begins on the date of transfer; his seniority in the old department is lost unless he is called back to his old operation by the Foreman, said transfer to be agreeable to both the Company and Union. The above provision has no effect on transfers made prior to the date of this Agreement.

The foregoing shall not apply in the case of an employee who follows a machine which has been transferred from one department to another. In such cases the employee shall retain full seniority rights in his former department as long as he continues to work on the transferred operation. However, upon completion of one (1) year's service in the new department, the employee's date of entrance to his former department shall be established as his seniority date in the new department, except that in the event the employee shall at any time within the year following the transfer bid off the transferred machine and/or operation, he shall immediately forfeit all rights to have his service in the former department added to his length of service in the new department. In such case he will be permitted to retain seniority rights in his

former department for one (1) year following his transfer therefrom but his seniority in the new department will date only from his entrance thereto.

Whenever an operation is transferred from one department to a second department, and the employee on the operation transfers to follow his job, such employee cannot be replaced by another from within the second department, using the layoff provisions of this Agreement, for a period of one year from date of transfer as long as he remains on the transferred job.

SECTION 3. Promotion to Positions Not Included in the Bargaining Unit. Any employee promoted to a position excluded from the bargaining unit shall retain indefinitely all seniority rights so long as he occupies such status in the factory where such rights originated. Such employee shall not retain any rights to a specific machine.

In the event an employee is transferred as an Assistant Foreman, Instructor or Foreman Trainee to another of the Company's factories, retention of seniority shall be limited to eighteen months beginning with the date of transfer.

Any employee promoted to the status of Foreman in any of the Company's factories shall retain all seniority rights in this factory only for a period of one (1) year beginning with the date he assumes the duties of his new position.

If the employee should be demoted by the Company while he has the seniority rights mentioned above, he shall return to the job he formerly held and will be accorded all seniority rights on that job and in that department as if he had never been promoted. Such employee shall not retain any rights to a specific machine.

The Company shall notify the Union whenever it intends to change the status of any employee covered by the foregoing and shall give the date when such changed status is to be assumed.

SECTION 4. Loss of Seniority—Other Employment. When an employee leaves the service of the Company for the purpose of accepting other employment, he shall lose all of his previous seniority.

An employee shall lose seniority if he is away from the factory for eighteen (18) consecutive months.

SECTION 5. Preferential List:

(A) Definition and General Provisions. An employee laid off because of slack work on his particular operation or operations shall not lose his seniority on these operations but shall be entitled to be placed on the Preferential List of his department for a period not to exceed eighteen (18) months. If at any time a vacancy occurs within the department and it is not filled by bids within the department, said job shall be offered to employees on the Preferential List in order of their senority ratings, subject to the restriction that no employee shall have the right to be placed on the Preferential List until he has completed ninety (90) days' service in the particular department.

Any individual laid off because of lack of work on his regular operation and because of said reason forced to leave the factory shall, if he is interested in being notified of any subsequent job opening, sign his name on a list to be posted in his own department and indicate thereon the date of his layoff. In the event a job vacancy occurs in his department, the Shop Steward of said department shall, where warranted, advise the laid off employee in sufficient time to permit him to bid on said job vacancy.

A master list will be posted in the foyer of the factory. On this list each employee who is laid off will sign his name indicating thereon his factory seniority date. If a job opening occurs and is not filled by employees within the department in which it originates, the Company shall by reference to the aforesaid master list call the oldest employees in point of factory seniority and offer said job to them.

(B) Procedures. An employee on indefinite layoff from his regular job has the right to sign the Preferential List and/or bid on any vacant job within the factory.

When such employee bids on a vacant job, his average for purposes of the award is zero. He shall be entitled to a trial period of 40 hours and may advise his Foreman at the end of any day that he is rejecting the job and will return to layoff status.

An employee who signs the bid for the new job, and successfully complete the trial period, shall acquire seniority on the new job immediately. His department seniority will be in accordance with the seniority provision of this article relating to transfers across department lines.

If the employee elects not to sign the bid, he acquires no seniority on the new job and may be later displaced by a probationary operator working toward his seniority in the department.

SECTION 6. Seniority of Employee Fulfilling Required Military Service. The provisions of the Veterans Reemployment Act are hereby incorporated into and made part of this Agreement. The regulations and interpretations of the governmental agency charged with the administration of said Act shall also be incorporated into and made part of this Agreement. All questions of regaining seniority relating to employees covered by said Act shall be determined in accordance with the wording of said Act and the administrative regulations pertaining thereto. In case of replacements necessitated by regular employees being called for military service or enlisting for such service, the Company shall advise such replacements at the time of their hiring that their tenure of employment is of a temporary nature.

SECTION 7. Required Notification of Absence. An employee who is absent for any cause shall be required to give notification to the Company as soon as possible but no later than 9:00 a.m. on the first day of absence, stating the reason for said absence and its probable duration. The Company shall waive the foregoing in any case where it was impossible for the employee to give such notice within the time specified.

If at the end of the third day of absence no report has been received by the Company, the absentee will be presumed to have quit without notice and will be replaced.

SECTION 8. Seniority Lists and Notification of Job Changes. The Company and Union shall develop plans whereby employees may readily determine the status of their seniority.

A departmental seniority list shall be posted in each department and revised by the Company on June 1st and December 1st of each year.

Whenever an employee changes jobs, a copy of the Payroll Change recording such change will be given to the Union and the employee who shall initial same and shall be kept in the employee's permanent record. The Company shall give to the Secretary of the Local Union at the beginning of each week a report indicating all employee entrances, exits and job changes which have occurred during the preceding week.

SECTION 9. Job Bidding. In case a new job is created or a vacancy occurs, it shall be posted and advertised as open for bids; the oldest operator by seniority within the department shall have the first choice of bidding on same. Operators bidding for jobs in this manner will be allowed to have an unlimited number of jobs listed on their cards. If there are no eligible bidders in the department where the vacancy occurs, bids shall be posted in other departments. Eligibility of such employees of other departments to bid, however, shall be limited to those who have had at least two (2) years of service in their present department.

When a job vacancy occurs within a department, it shall remain posted for a period of sixteen (16) working hours.

Further, at the same time a job vacancy is posted in the department where it occurs, a similar notice shall be posted in the factory lobby inviting employees of other departments to enter bids, which would be considered on the basis of factory seniority in the event the opening is not filled by an employee having seniority in the department of origin. The department and lobby announcements shall be removed simultaneously at the end of sixteen (16) working hours.

Any other openings resulting from bids on the original opening shall remain posted for eight (8) working hours with the understanding they shall not be removed before 8:00 a.m. of the day following the posting.

The Company reserves the right to challenge the physical fitness of any bidder or to show cause why his promotion would materially decrease production of the factory. In such instances the Company and Union shall endeavor to agree upon a proper solution for the particular problem.

Promotion shall be denied an employee, regardless of his seniority, if (a) in the past year he has had excessive unexcused absence, or (b) in the past six (6) months he has had excessive reprimands for poor work as compared with other employees on his job.

An employee bidding on a job vacancy if successful shall be assigned to said job within two (2) weeks following the closing of the bid unless it is agreed by the Company and Union that to do so would seriously impair the production of the factory. In all events, the job seniority of a successful bidder shall begin as of the date the job was awarded to him.

In filling a job vacancy which has been posted for bid, the first two bidders listed who actually work on the job will be permitted not more than forty (40) hours each in which to decide whether they wish to remain on the job or not, and if neither accepts, then the balance of

those listed will be offered the job, in order of seniority, without the right to the trial period, until an operator accepts or is selected from some other source.

A successful bidder on a job vacancy entitled to the 40-hour trial period as stated above shall be permitted not more than forty (40) hours in which to decide whether he wishes to remain on the new job. If he fails to express his desire to return to his former job within the time specified, he shall not be permitted to do so at a subsequent date unless he is laid off of work on the new job as a result of his lack of seniority thereon.

Furthermore, he shall be permitted only two (2) rejections in a period of one (1) year of jobs on which he has been a successful bidder. (This shall apply only when the bid is on an established job which produces average earnings above the factory minimum in effect at the time.) It is further understood that if an employee is moved for Company convenience before he has completed his forty (40)-hour trial period, he shall begin a new said trial period each time he returns to the new job.

SECTION 10. Eligibility Requirements for Permanent Job Transfer. No employee shall be permitted to bid on a job of equal or less status than his regular job. In determining the eligibility of an employee to bid on a job, the comparative status of the jobs shall be based upon the line average of the bidder's job and the line average of the job on which the bid is entered. This provision shall not, in the absence of agreement between the Company and Union, replace any existing eligibility determination based upon job ratings, and it may be waived by action of both the Company and Union if it is apparent the health of the bidder necessitates a change of work.

SECTION 11. Probationary Operators. New employees shall be considered as probationers without seniority rights until they have received a total of thirteen (13) pay checks during the period of their first twenty-six (26) weeks of employment, and thereafter their seniority shall

begin with the date of employment. Probationers shall have no right to bid on a job vacancy; however, in the event a vacancy on another job occurs and there has been no bid thereon, the Foreman shall have the right to move a probationer or hire help outside the factory as he may see fit.

A probationary operator may be laid off or dismissed during his trial period. The Company's action with respect to such probationary employees shall not be subject to the grievance and arbitration procedure of this Agreement.

When an employee completes his probationary period, he will be credited with seniority only on the job on which he is employed at that time, with seniority dating from his first day of employment on said job. In the event, however, that the probationer is transferred temporarily from the job for which he was originally hired and is working on the temporary job at the time his probationary period ends, he will be credited with seniority on the job on which he was working before the temporary transfer took place.

SECTION 12. Limitation on Number of Bids Allowed. Any regular operator (one who has completed his probationary period) shall be restricted to a maximum of one (1) bid during any period of one hundred twenty (120) consecutive days; provided, however, that should an operator be required to transfer back to a job on which he has seniority because work on his regular job has been eliminated, the foregoing restrictions on bidding shall not apply.

SECTION 13. Required Return to Higher-Rated Job. When a operator bids on a higher-rated job and gains seniority thereon and is subsequently, because of lack of work, forced to return to his former job, he shall be required to return to the higher-rated job when an opening occurs thereon. (This shall mean that not less than four (4) hours' work is available.) His refusal to do so

shall result in forfeiture of seniority on said higher-rated job unless his average is higher than that of the line on the higher-rated job.

Whenever a job has been filled, the successful bidder and the Union shall be notified.

SECTION 14. Help-Out Operators. Operators may be used for half-day or less to help out on any job. If more time is needed, the Foreman shall call in help as needed to take care of work by recognizing class and seniority rights. Before anyone shall have rights on any job at any time, he must be experienced on the job and be able to take care of his part of the work.

When an operator is added temporarily to a job in order to get the required production through said operation, it is understood he shall be removed immediately therefrom when it becomes apparent the regular operators can handle the normal flow of work on hourly basis without working overtime.

SECTION 15. Assigning Pick-up Work. In assigning pick-up work, the Company shall offer it to the operator in that department who (1) otherwise would be forced to leave the factory for lack of work, (2) has the greatest department seniority among employees who have completed work for the day on their own jobs, and (3) is experienced (where experience is required) on said pick-up work; provided that the foregoing shall not apply where the pick-up work has in the past or on the day in question been given as a regular practice to part-time employees.

SECTION 16. Filling Final Inspect Vacancies. The Company shall have the sole right, regardless of seniority, to select employees to fill vacancies occurring on the job of Final Inspect (Packing Department). This shall apply only when such job is a full-time job and is not combined with another job in the department. Any employee

thus selected by the Company shall retain all seniority rights in a former department for one (1) year. Employee desiring consideration for such a job shall so advise the Company.

SECTION 17. Filling Trial and Sample Runner Vacancies. Any vacancy on jobs of trial and/or sample runner shall be filled at the discretion of the Company without being posted for bids. Employees desiring consideration for such jobs shall so advise their Foreman. This provision shall not prevent the displacement of anyone of these jobs in the event he has the least seniority in the department.

SECTION 18. Layoff and Return during Workday. When an employee has been laid off at any time during the workday and has been told he is to report later during that day, the exact time for his return shall be specified by the Company.

SECTION 19. Equal Sharing of Work Types on Job. A new operator may be assigned appropriate work during his training period. As soon as an operator has sufficient experience, he shall be required to share with all other operators each and every type of work on his operation. Nothing in this section shall be construed to limit factory management, the Local Union and the Regional Union Office from agreeing to phase certain operations.

SECTION 20. Bumping to Different Machine. When an employee has lost as much as two (2) days of work as the result of a breakdown of his machine, he shall be permitted to move to the machine occupied by the operator holding the least job seniority on his particular operation.

SECTION 21. Retraction of Notice of Intent to Quit. When an employee advises his supervisor of his intent to quit, he shall have until 7:00 a.m. on the third day following the date on which notice was given in which to retract said notice. The Foreman, Shop Steward and employee shall sign a notice of intent to quit. The Foreman, Shop Steward and employee shall sign a notice that intent to quit has been retracted. However, if an employee actually does quit, he shall not be given this period in which to retract his notice.

SECTION 22. Filling Conveyor Line Utility Job Vacancy. Any vacancy on the utility job of a conveyor line shall be filled at the sole discretion of the Company. Any employee thus selected by the Company shall retain all seniority rights in his former department for one (1) year. Any employee desiring consideration for such a job should so advise the Company.

SECTION 23. Filling Set-Up or Maintenance Department Vacancies. Whenever a vacancy for Set-Up or Maintenance Department Operations occurs, the Company shall post a notice to that effect, allowing employees to sign such list indicating their interest in being selected for the opening. The Company shall have the right to select the person to fill such opening or go to the outside to fill such vacancy.

ARTICLE VII—LAYOFF

SECTION 1. Layoffs and Bumping Rights. When because of a slack schedule it becomes necessary to curtail work in a department, the following procedure shall be followed for each operation: (A) when there are five (5) operators or less and one (1) part-time operator is needed, the operator having the least seniority will work part-time; (B) where there are six (6) or more operators on a job requiring a part-time operator, the reduction in work will be divided between all of the operators on that job; (C) any operator not needed at all shall be laid off.

In the event it becomes necessary to reduce the force, each employee affected by the force reduction shall have

the privilege of taking another job or operation that his job seniority standing will permit. If his job seniority is not sufficient to permit him to replace other employees in the department, and he has been employed at least nine (9) months in his present department, he shall have the privilege of replacing the youngest employees in that department. The right to displace an employee in accordance with job seniority shall be limited to the two (2) weeks following the date of layoff.

If it is not possible for such an employee to displace anyone in his own department, he may, if he has been employed at least two (2) years in his present department displace the employee holding the least factory seniority.

An employee may exercise bumping rights to replace an operator on a job on which the Company has the right of placement if such employee has previous seniority on said job.

Operators displacing another under these provisions shall be paid at the piece rate or hourly rate of the job held by such displaced employee. In the event the regular operator declines this job, he shall be placed on the Preferential List.

An employee laid off because of lack of work on his operation shall not be permitted to challenge the layoff as being improper unless said challenge is made within two (2) full working days following the layoff.

Employees laid off because of lack of work during inventory week or the week preceding inventory week shall not be allowed to exercise seniority rights on any other job during such two (2) week period.

SECTION 2. Return to Work After Layoff. An employee who has been on layoff for two weeks or less, when called back to work, shall report to his Foreman within 24 hours of receipt of notice unless he has a bona fide excuse. When an employee has been laid off indefinitely, he shall report to his Foreman within three (3)

days from the date of receipt of notice of recall or forfeit his seniority. When an employee leaves the city, he shall leave the factory Office manager his forwarding address.

SECTION 3. Permanent Discontinuance of Job.

(A) Whenever employees are displaced as the result of a change in operation or method of construction, the Company and Union will confer and seek agreement on method to be used in rehabilitating the workers who are thus affected.

Whenever jobs are to be combined in a department, the Company will first discuss with the Union as to which operators and operations will be involved.

(B) When a job is being discontinued and is being replaced in whole or in part by another operation, the displaced employees shall have primary rights, without bidding, on the new operation. Only in the event a displaced employee refused employment on the new operation shall the vacancy be posted and bids solicited thereon.

In dealing with employees displaced in accordance with the foregoing and who have no other job seniority, the Company shall proceed as follows:

(1) The number of such affected employees shall be determined;

(2) The youngest employees (in department seniority) to a number corresponding to (1) shall be determined and their jobs listed;

(3) The employees listed in (1) shall in order of departmental seniority be given choice of the jobs set forth in (2) or be given the right to go onto the Preferential List.

(C) Any employee laid off because of the discontinuance of his job shall be expected to exercise whatever seniority or bidding right he may have on other jobs

within his own department. In the event the employee has no such rights within his own department, he shall be permitted to bid on a job in another department and shall be given full rights to said job in the event the only bidders thereon are temporary or probationary employees, or in the event there are no bidders from the department wherein the vacancy occurs.

The foregoing shall in no way amend or alter the provisions of Section 2 of the Seniority Article concerning transfers across department lines. It is, however, understood that should there be a reinstatement of a discontinued job, employees formerly employed thereon shall be required to return thereto, at which time all former job and department seniority shall be restored to them. Their seniority in the last department shall be suspended and may be exercised only in the event the reinstated job were to be subsequently eliminated.

SECTION 4. Service Record. If an employee's job is eliminated, or he is laid off for lack of work or closing of the factory, and obtains permission to transfer to another one of the Company's facilities, shall retain eligibility for vacation and retirement benefits without break in Company service provided (a) the employee has not rejected employment within his own factory on a job on which he holds seniority, and (b) the transfer to the new factory is completed within one (1) year following the elimination of his job.

ARTICLE VIII—LEAVE OF ABSENCE

SECTION 1. A leave of absence without pay may be granted to an employee, but only upon the joint written approval of both the Union and the Company. Any employee overstaying an authorized leave of absence will be subject to such disciplinary action as the Company may determine, including termination.

SECTION 2. An authorized leave of absence shall be without pay and shall include and be limited to the following:

(A) A leave of absence other than medical not to exceed thirty (30) days; extension of such leaves may be granted in weekly intervals with a valid reason satisfactory to the Company.

(B) Medical Leave of Absence.

(1) For any employee who has completed the probationary period, an initial medical leave of absence in any weekly increment not to exceed 4 weeks (30 days) may be granted upon written request accompanied by a physician's statement. The leave shall begin on the date specified by the employee's physician or by Company determination in the absence of a doctor's statement. An employee may request extensions of medical leave in any weekly increment up to an additional 4 weeks (30 days) upon additional written request accompanied by a physician's statement. The Company may require substantiation for all such requests by a physician selected by the Company. The burden of proof for all leaves is upon the employee. Once such a medical leave has been granted, the employee has the right to return to his same job or exercise his seniority rights in the event his former job has been eliminated in his absence.

In the case of pregnancy, the above sick leave rules apply. It is understood that for normal childbirth, the disability period approximates six weeks after delivery, and medical leave should terminate at that time unless there are complications associated with the childbirth requiring additional medical leave. Additional time off, if granted, to spend with the child will be considered other than a medical leave of absence.

An employee returning from a leave under this paragraph must notify the Company by 3:00 p.m. the day prior to his return.

(2) Protracted Convalescence. In the event an employee has been out on a medical leave of absence for eighteen (18) months, his seniority will terminate at that time and his seniority may be regained only in the event that:

(a) the employee's length of service in the factory exceeds the amount of time on leave

(b) no more than five years' time has elapsed from the date of the original medical leave of absence

(3) Reinstatement After Medical Leave of Absence Exceeding Eighteen Months. Upon being certified physically and mentally able to return to his former job by his personal physician, as may be confirmed by a physician appointed by the Company, the employee shall be reinstated to his job if:

(a) he is capable of doing the job satisfactorily;

(b) he would have retained the job if he had not been on leave

(c) the job still exists.

If these conditions are not met, then placement depends on his seniority rights as provided in this Article.

(C) Whenever a leave of absence is expected to continue beyond thirty (30) days, the job thus vacated shall be posted for bids. The replacement operator shall be granted seniority rights to such job. In the event the original operator returns to claim his job, the replacement operator shall retain the seniority rights thus acquired for later exercise should a vacancy occur.

(D) If the employee fails to report to work at the end of his leave of absence, or he accepts other employment, then he will be automatically terminated.

(E) A leave of absence to serve as an official of the Union for a period not to exceed eighteen (18) months.

(F) If any employee obtains an authorized leave of absence by fraud, then such employee may be discharged from employment by the Company.

(G) An employee whose reason for the leave of absence ceases to exist before the end of the official leave must return to work and must notify the factory at least three days prior to his return.

ARTICLE IX—HEALTH INSURANCE

1. The Health and Welfare Plan agreed upon by the Parties shall continue in full force and effect for the duration of the contract except for the following amendments:

(A) Weekly Indemnity Benefits: Effective November 1, 1990, the "Sick and Accident" weekly benefit shall be increased to $80.00 per week for up to 15 weeks. Effective November 1, 1991, the weekly benefit shall be increased to $85.00 per week for up to 15 weeks. Effective November 1, 1992, the weekly benefit shall be increased to $90.00 per week for up to 15 weeks.

(B) Effective November 1, 1990, the Lifetime Maximum Benefit applicable to combined in-patient, Home Health Care, and out-patient surgical benefits shall be $100,000 per person. Effective November 1, 1992, the Lifetime Maximum Benefit shall be $110,000 per person.

(C) The Company will participate with the employees in negotiating discounted programs with providers and implement those programs as are acceptable to both parties. Discounts will be shared equally. Discount plans shall be subject to annual review.

2. A summary Description of the Plan, as amended, will be issued to more fully inform the employees and their dependents of the coverage of the Plan. The rights of the Parties under the amended Plan are fully set forth in that document, and any claims or disputes of claims are to be resolved under the Claims Procedure therein, and will

not be subject to the Grievance Procedure as set forth in the Labor Agreement between the Parties.

ARTICLE X—LIFE INSURANCE

All employees having sufficient service with the Company shall be permitted to carry $5,000 life insurance, with a rider covering accidental death and dismemberment, for which they will pay a monthly premium of $2.00 per capita. The Plan will also include a double indemnity clause, and will provide the right to convert upon severance of employment for any reason. Covered employees shall be afforded an option to carry an additional $5,000 life insurance at an additional monthly premium cost of $1.90 per capita.

Any employee retiring thereafter, upon attainment of age 62, will be permitted to maintain $2,000 life insurance in force by paying eighty cents ($.80) per month toward the premium thereof. Such retired employee upon reaching age 65 shall then have the option of continuing the $2,000 coverage for which he shall pay $24.00 annually toward the premium thereof or accept a reduction in coverage to $1,000 with the Company paying the entire premium thereof.

When an employee is on a medical leave of absence, the Company shall notify the President of the Local Union before life insurance coverage of such employee is cancelled for any reason.

ARTICLE XI—PENSION PLAN

1. The Pension Plan agreed upon by the Parties shall continue in full force and effect for the duration of this contract, except for the following amendments:

A. Effective January 1, 1991, pension benefits will be increased to $7.75 per month per year of credited service.

B. Effective January 1, 1992, pension benefits will be increased to $8.25 per month per year of credited service.

C. Effective January 1, 1993, Pension Benefits will be increased to $8.50 per month per year of credited service.

D. Employees who have reached the age of 55 and have 25 years of credited service may elect early retirement with reduced benefits based upon full actuarial reduction levels that result in no cost to the plan.

2. Claims for benefits under the Plan are not grievable under the grievance and arbitration procedures of this contract, because claims procedures covering such are defined in the Plan.

ARTICLE XII—SEVERANCE PAY

In the event it becomes necessary to close a plant permanently, and since the Union recognizes the Company's right to make such a decision, and both the Company and the Union acknowledge that a permanent plant closing will cause employees affected thereby to lose valuable contract rights, including loss of accrued seniority, possible loss of enlarged vacations and other benefits, and some employees may sustain loss to sale of their homes and have additional costs in relocating, in order to offset the effect of such a decision on the employees of the plant permanently closed and to partially compensate and reimburse them for such losses, severance pay will be granted according to the following schedule:

$30.00 per year of continuous credited service, with a minimum of 15 and a maximum of 30 years ($450.00 to $900.00).

Such severance pay is not deemed to be and shall not be considered unemployment compensation and shall be

payable in a single payment regardless of whether or not the eligible worker has found other employment following such permanent plant closing.

Individuals who are permanently separated as a result of the closing of a plant will be allowed to convert their health care plan, within thirty-one (31) days of separation, without regard to the ten (10)-year minimum service requirement (See Article IX, III (E) *Conversion.*)

Because of the foregoing, there shall be no further obligation on the part of the Company to negotiate with the Union concerning the decision to close a plant and concerning the effect of such a decision upon the affected employees.

ARTICLE XIII—GRIEVANCES

SECTION 1. (A) General Procedures. Grievances shall be signed and presented by the complaining employees to the Shop Steward in the department who shall present them in writing to the Foreman of the department immediately. If any grievance is not adjusted by this procedure, the Shop Steward, accompanied by the Business Agent shall then take the matter up with the Plant Manager. No such written grievance shall be submitted to the Plant Manager unless it has been investigated and approved by the Executive Board or Plant Union Committee of the Union. The Plant Manager shall indicate on the grievance the date on which it was presented to him and on all complaints which do not pertain to piece rates shall make answer within the next five (5) working days. If the grievance is not settled by these negotiations with the Plant Manager, then the Executive Board or Plant Union Committee of the Union shall designate representatives to negotiate with the Plant Manager or such other representatives of the Company as shall be designated by the Company for such purpose.

Individual claims for benefits under the Health and Welfare, Life and Pension Plan will not be subject to the

Grievance Procedure inasmuch as claims procedures covering such individual matters are specified in those plans.

All grievances, other than those with specific time limits for filing mentioned elsewhere in this Agreement must be filed within 30 calendar days of the event which caused the grievance.

(B) Appeals Notification. The Union shall be allowed ninety (90) days after answer has been made by the Labor Cost Analysis Department or Plant Manager, as the case may be, on any grievance to ask for a meeting with representatives of the St. Louis Office for purposes of reviewing said answers or answers, unless the Company is notified of the Union's desire to appeal its answer on any grievance within ninety (90) days, it is understood the Union shall forfeit the right to proceed further and any such grievance shall be considered as settled.

SECTION 2. Discharge Grievances. If any employee covered by this Agreement be discharged for cause, the Company shall show cause upon request of the Union provided such request is made in writing within seven (7) days after discharge. Grievance pertaining to discharge cases will not be considered if not taken up within seven (7) days after discharge, but all cases taken up within that time shall be settled by the same procedure as provided herein for settlement of other types of grievances. If consideration of any discharge case results in a decision that the employee involved was unjustly discharged, such employee shall be reinstated with all rights and privileges held before such discharge and full pay for all time lost as a result of such discharge, except where any operator has been discharged for cause and the Company agrees to reinstate said operator then no back pay shall be allowed.

When a final answer, so specified, has been made by the Company either by a Plant Manager or by the Executive Offices of the Company to a grievance involving the discharge of an employee, the appeals steps in

the grievance procedure shall be waived and the issue may proceed directly to arbitration if timely notice of such intent is given by the Union.

SECTION 3. The Company and the Union shall agree upon a regular time and place for the negotiation of all grievances and other matters of mutual interest and all such matters shall be presented and negotiated at such agreed time and place, except that matters requiring emergency treatment may be negotiated at any time. Grievances pertaining to piece prices shall not be considered as of emergency character.

SECTION 4. Designated representatives of the Union shall be allowed time off from work, without pay, to attend to their duties in negotiating grievances or for other proper business of the Union pertaining to this plant without discrimination or penalty because of such activities.

SECTION 5. When the Union is unable to reach a satisfactory agreement with officials of this plant, complaints will be taken up within two (2) weeks with designated representatives of the General Offices of Brown Shoe Company.

SECTION 6. After an Appeals Meeting has been held and final disposition made therein of a grievance, the Company shall confirm by memorandum to the Union its final answer relative to such grievance.

SECTION 7. Lockout and Work Stoppage Prohibited. During the term of this Agreement there shall be no strike, picketing, boycott, sympathy strike, stoppage or other interference with work by employees nor lockout by the Employer. It is agreed that any employees violating this provision shall be considered as having resigned their jobs and in such event the vacancies shall be filled in accordance with this Agreement.

SECTION 8. Time Studies Resulting From Grievances. In the event that a time study is made by the Company

as a result of a grievance properly submitted by the Union, it is understood and agreed that a representative of the Union shall be permitted to be present during the making of such test and shall be permitted to view the results of the test. The Company in the foregoing cases shall furnish to the President of the Local Union a copy of the time study summary sheet and shall, if requested, permit the Union representative to see the complete data sheets pertaining to the time study.

ARTICLE XIV—ARBITRATION

SECTION 1. In the event that any matter covered by this Agreement cannot be settled through joint conference of the Company and Union Representatives, it shall, upon written request for arbitration by either the Company or the Union to the other, be referred to arbitration.

Time Limit to Submit Grievances for Arbitration. The Company shall not accept a request for arbitration from the Union unless said request for arbitration is given within one hundred twenty (120) days immediately following the date of the Appeals Meeting at which the Company makes its final answer to any grievance submitted, or the date of its final answer, if said final answer is given later than the Appeals Meeting.

SECTION 2. Selection of Arbitrator. In the event arbitration is necessary, an Arbitrator shall be selected from a panel of Arbitrators to be agreed upon by the Company and Union.

The procedure to be followed in the selection of an Arbitrator shall be:

(1) As soon as the request for arbitration is received, within ten days, representatives of both the Company and the Union shall meet at a place of their mutual convenience for the purpose of selecting an Arbitrator from the above list.

(2) All names from the above enumerated list shall be placed in a container and five (5) names shall be drawn therefrom. The five (5) names so drawn shall constitute the panel of Arbitrators.

(3) The Union shall then scratch one of the five names on the panel, and a record will be kept of the order in which the name was scratched.

(4) The Company shall then scratch one of the remaining four names on the panel, and a record shall be kept.

(5) The Union shall then scratch another name from the panel followed by the Company scratching one of the two remaining names.

(6) The remaining name shall be requested to serve as Arbitrator.

(7) In the event the man whose name was thus selected is unable or unwilling to serve, the invitation shall be extended to the other members of the panel, with the Company's second scratch being the first invited, then the Union's second scratch, and thus alternating until an Arbitrator is able to serve.

(8) In the event no member of the panel is able or willing to serve, then the names of the other Arbitrators in the above list shall be selected in the same manner as above, and the same procedure shall be followed until the names of all Arbitrators listed have been exhausted.

(9) In the event of failure to agree on an Arbitrator, the parties shall request the Director of the Federal Mediation and Conciliation Service to appoint a neutral Arbitrator to serve.

(10) The decision of the Arbitrator who hears the issues presented shall be accepted by both the Union and the Company and his award shall be final and binding upon both.

SECTION 3. The cost of arbitration shall be borne equally by the Company and Union except that the Company shall assume the entire cost of producing the original copy of the transcript.

SECTION 4. Where a party desires to file a brief following the close of an arbitration hearing, it shall be required to do so within the three (3) weeks immediately following receipt of transcript of the proceedings.

SECTION 5. The Arbitrator shall be required to render his decision within the thirty (30) days following his receipt of briefs submitted by the parties.

ARTICLE XV—MANAGEMENT

SECTION 1. The management and the direction of the working force including the right to hire, suspend, transfer, or discharge for proper cause and the right to relieve employees from duty because of lack of work or for other proper reasons is vested in the Company; provided, however, that this will not be done for purposes of discrimination against any member of the Union or in a manner contrary to the provisions of this Agreement.

SECTION 2. The Company shall have the sole right to decide the processes of machinery and and equipment to be used, types of products to be manufactured, quality of material and workmanship required, selling prices of products, methods of making and selling products, personnel to be employed in supervisory, clerical and mechanical positions.

ARTICLE XVI—GENERAL PROVISIONS

SECTION 1. Publication of Company Rules. All employees covered by this Agreement shall be governed by the safety and other rules now in effect and such other rules not in violation of the Agreement as may be adopted by the Company and published to the employees on

bulletin boards or by general distribution. Any new rule established shall not be effective until three (3) days after publication and any such rule established shall be subject to discussion and adjustment in the manner as outlined herein for settlement of grievances.

SECTION 2. Bulletin Boards For Union. The Company shall provide a bulletin board on the first floor of the factory for the sole use of the Union for posting of announcements and other matters of interest to the Union. Bulletins posted shall be confined to the proper business of the Union and matters of controversial, irrelevant or objectionable nature shall not be posted.

SECTION 3. Protection of Company Property. Under no consideration shall the Union call out on strike such maintenance employees or watchmen who would be necessary for the protection of the Company's property; provided, further, such employees retained shall not be permitted to perform any duties outside of their regular duties for the protection of said property.

SECTION 4. Providing Tools. The Company shall furnish to each employee free of charge all tools necessary to perform the particular operation or operations on which he is employed, all tools necessary for repairs and adjustments, and accessories, whenever considered by the Company to be necessary for the safety of such employees while working on the job. All replacement of such tools and accessories shall be furnished by the Company free of charge, provided that worn tools or accessories are returned to the Company at the time request is made or replacements thereof. In the event the employee does not turn in the worn tools in exchange for replacements, the employee will be charged for such replacements. Employers who are separated from the Company shall be required to return all tools and accessories to the Company at the time of separation or shall be charged therefor.

SECTION 5. Supervisors Performing Production Work. No supervisor shall be used on production work

so long as a qualified operator is available to perform said work. In the event it is necessary to maintain production and no qualified operator is available, a supervisor may be used as a replacement for such time as it is necessary with the understanding that lot or case number work thus performed by him shall be turned in to the factory office.

The foregoing provision shall not prevent a supervisor working temporarily for practice purposes so long as the regular operator or operators on the job in question shall not be subjected to loss of wages as the result of his work.

SECTION 6. Work Sharing on Samples. Wherever piece rates are paid for work on samples, such work shall be shared equally by all qualified employees on the line.

SECTION 7. Payroll Deductions for U.S. Savings Bonds. Payroll deductions for the purchase of United States Savings Bonds shall be made from each weekly pay check.

SECTION 8. Overtime Premium on Check Stubs. On and after October 31, 1966, the Company will show overtime premium pay as a separate entry on check stubs.

SECTION 9. Lights on Parking Lots. The Company shall install dusk to dawn overhead lights on factory parking lots wherever needed.

SECTION 10. Air Conditioning. Air conditioning shall be started early enough in the morning and continued after regular hours whenever a group of employees is required to work at such times.

SECTION 11. Computation of Three Weeks' Averages. Whenever former three weeks average hourly earnings are used for holiday or other purposes throughout this Agreement, the past three calendar weeks that production was scheduled into the factory will be used to compute these earnings. In the event an employee did not work all of these weeks, the average will be based on the

weeks actually worked, except that if the total hours worked during this period were less than sixty, earnings during a sufficient number of former weeks will be used up to and including the week that will bring the total time to a minimum of sixty hours.

SECTION 12. Establishing Multi-Shift Agreements. As the need arises, multi-shift agreements may be negotiated for the individual factories.

ARTICLE XVII—EQUAL EMPLOYMENT OPPORTUNITY

The Company and Union agree that there shall be no discrimination against any employee or applicant for employment because of race, religion, color, origin, sex, age, physical or mental handicap.

ARTICLE XVIII—ENERGY CONSERVATION

If, during the life of this Agreement, any of the utilities or municipalities which supply energy to the Company cut energy to the Company or install a temporary or emergency plan to conserve energy or order the Company to conserve energy, the Company, the Local Union, and the Union Offices in St. Louis will meet to discuss the best ways to conserve energy with the intention that an arrangement agreeable to the Company and the Local Union shall be reached, unless the utilities or municipalities order the Company to conserve energy in a specific fashion.

ARTICLE XIX—LEGALITY

All provisions of this Agreement are assumed to be in conformity with the applicable laws of the United States and of the State in which the factory covered by this Agreement is located. If any provisions of the Agreement are later proven to be contrary to any applicable law existing at this time, or passed hereafter, such provisions shall then be considered void.

ARTICLE XX—AMENDMENTS

Amendments to this Agreement may be made at any time during the life of this Agreement by mutual consent of the parties hereto. Such amendments shall be in writing and signed by both parties, shall become a part of this Agreement, and shall terminate at the same time as does this Agreement, except as continued in full force and effect by consent of the parties. Such Agreements as are Supplements to this Agreement shall modify the terms of this General Agreement and such modifications shall take precedence over the terms of the General Agreement.

ARTICLE XXI—TERMINATION

This Agreement shall become effective September 20, 1990, and remain in effect until August 27, 1993. Should either party decide to alter, amend or terminate this Agreement on its expiration date, said party shall give written notice of such intent to the other party sixty (60) days before the expiration date. If the party or parties fail to give such notice, the Agreement shall continue in full force and effect for another year, and so on from year to year until proper notice is given.

FOR THE COMPANY:	FOR THE UNION:
	FOOTWEAR DIVISION, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO & CLC
By /s/ David Rutkowski Director of Industrial Relations	By /s/ William L. Treece Assistant Director For Footwear Manufacturing and Processing Division
By /s/ [Illegible] Plant Manager	FOOTWEAR DIVISION, LOCAL 751 AS CHARTERED BY THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION
	By /s/ Virginia Robertson
	By _____

APPENDIX B

BROWN SHOE COMPANY

BROWN SHOE COMPANY
8300 Maryland Avenue
Post Office Box 354
St. Louis, Missouri 63166
(314) 854-4000

David J. Rutkowski
Vice President
Industrial Relations
(314) 854-2615

January 17, 1992
Via Certified Mail—
Return Receipt Requested

Mr. William L. Treece
Assistant Director for Footwear,
Food Processing and Manufacturing
UFCW
300 Weidman Road
Manchester, Missouri 63011

Dear Mr. Treece:

The purpose of this notice is to comply with the Worker Adjustment and Retraining Notification Act (WARN) and provide you, as the collective bargaining representative, with the notice required by WARN with respect to a plant closing and permanent layoff of employees at Brown Shoe Company, West 5th, Dixon, Missouri 65459. This notice concerns a plant closing and permanent mass layoff.

The scheduled date for the plant closing and permanent layoffs is the fourteen (14)-day period beginning on March 20, 1992.

It is anticipated that a total of two hundred and seventy-seven (277) employees whom you represent will

be laid off during the fourteen (14)-day period specified above. A list of job classifications of affected positions to be reduced, number of employees in each job classification and the names of the employees currently holding those affected jobs is attached hereto. While there are certain bumping rights under the collective bargaining agreement, those bumping rights have no application to a plant closure.

There are governmental agencies which can provide you and the employees you represent with information on available dislocated worker assistance. For information you may contact Mr. Larry Earley, Director, Division of Job Development and Training, 221 Metro Drive, Jefferson City, Missouri 65109, Telephone Number (314) 751-7796.

For further information regarding the plant closedown and permanent layoff from Brown Shoe Company you may contact me at

Brown Shoe Company
8300 Maryland Avenue
Post Office Box 354
St. Louis, Missouri 63105
Telephone Number: (314) 854-2615

Very truly yours,

/s/ David J. Rutkowski
DAVID J. RUTKOWSKI
Vice President—Industrial Relations

DJR/sh

APPENDIX C

Employee Name	Employee Number	Dept	Last Day Wk	Reason	Union	Status
Watson, Lee A.	490-74-3064	0208	01/02/92	38	U	TT
O'Neill, Dwight D.	488-80-3041	0420	01/06/92	56	U	TT
Burnett, Dennis E.	498-86-7729	0420	01/10/92	38	U	TT
Sims, Lisa F.	487-70-7528	0156	01/10/92	17	U	TT
York, Penellanie	490-72-8694	0364	01/10/92	38	U	TT
Vaughan, Lindy A.	444-66-3203	0498	01/13/92	38	U	TT
Davis, Timothy J.	430-25-8789	0409	01/15/92	51	U	TL
Lafollette, Reba V.	494-48-2502	0499	01/15/92	51	U	TL
Prock Jr, Donald L.	486-84-8456	0499	01/15/92	51	U	TL
Wyss, Marshall J.	490-68-8319	0416	01/15/92	51	U	TL
Elliott, Franky L.	497-90-0319	0286	01/20/92	51	U	TL
Mow, Lucinda R.	271-50-3191	0264	01/20/92	51	U	TL
Krull, Edith I.	499-92-1895	0286	01/20/92	51	U	TL
McClendon, Wayne A.	496-96-3526	0499	01/20/92	38	U	TT
Moran, Candice J.	311-78-3795	0261	01/20/92	51	U	TL
Wilson, Jo Ann	499-40-0497	0102	01/23/92	51	U	TL
Alexander, David J.	491-66-7359	0032	01/24/92	17	U	TT
Elseman, Lois I.	498-36-5794	0101	01/25/92	51	U	TL
Alexander, Pamela D.	497-64-8382	0101	01/27/92	51	U	TL
Dunlap, Jessie F.	500-70-9758	0282	01/27/92	51	U	TL
Clark, Michael B.	491-66-5481	0550	01/28/92	38	U	TT
Clark, Tammy L.	489-78-7598	0264	01/28/92	38	U	TT
Rollins, Mary M.	492-76-5412	0151	01/28/92	51	U	TL
Ray, Becky J.	497-54-2221	0303	01/30/92	51	U	TL
Sears, Dale G.	493-74-9023	0301	01/30/92	38	U	TT
Baker, Terry D.	497-92-4204	0499	01/31/92	38	U	TT

Doyel, Eula	490-30-9634	0261	01/31/92	16	U	TD
Hance, Tracy N.	486-70-2339	0286	01/31/92	51	U	TL
Pratt, Patricia D.	490-86-3342	0498	01/31/92	17	U	TT
Huffman, Frances J.	490-68-3866	0286	02/03/92	51	U	TL
Evans, Carolyn J.	493-50-1833	0251	02/04/92	51	U	TL
Alexander, Terry A.	316-78-4732	0401	02/05/92	17	U	TT
Fritchey, Donald D.	493-68-1625	0542	02/05/92	56	U	TT
Hardwick, Millie D.	497-82-6643	0155	02/06/92	51	U	TL
Johnson, Nancy E.	497-84-7435	0553	02/06/92	38	U	TT
Aaron, Sherry A.	497-84-7435	0264	02/13/92	51	U	TL
Beal, Elizabeth A.	497-70-4963	0119	02/10/92	51	U	TL
Becker, Brenda K.	491-66-5001	0264	02/10/92	51	U	TL
Boevingloh, Barbara A.	500-72-4912	0209	02/10/92	51	U	TL
Chapman, Bernice	527-50-7117	0264	02/10/92	51	U	TL
Cox, Meral	256-77-4626	0155	02/10/92	51	U	TL
Crews, Billi J.	500-66-3134	0264	02/10/92	51	U	TL
Doba, Dorania N.	415-94-2190	0261	02/10/92	51	U	TL
Faherty, Laura C.	500-88-8478	0286	02/10/92	51	U	TL
Foster, Barbara	322-42-2807	0276	02/10/92	51	U	TL
Fox, Wayne L.	489-20-1983	0351	02/10/92	13	U	TD
French, Susan K.	486-72-4358	0264	02/10/92	51	U	TL
Glick, Linda A.	564-29-5430	0154	02/10/92	51	U	TL
Goodman, Cristel	233-62-1616	0413	02/10/92	51	U	TL
Harsch, Kimberly L.	498-86-0506	0286	02/10/92	51	U	TL
Kissinger, Brenda C.	497-72-5924	0245	02/10/92	51	U	TL
Laramore, Wanda S.	500-78-1622	0261	02/10/92	51	U	TL
McNew, Gladys S.	264-92-0383	0846	02/10/92	51	U	TL
Moore, Sa Wol	498-78-1871	0173	02/10/92	51	U	TL
Norton, Beverly	496-62-3418	0190	02/10/92	51	U	TL

Employee Name	Employee Number	Dept	Last Day Wk	Reason	Union	Status
Rea, Erika K.	601-16-7198	0208	02/10/92	51	U	TL
Ruhl, Jane A.	162-54-0817	0245	02/10/92	51	U	TL
Scrabeck, Nina	261-41-1886	0261	02/10/92	51	U	TL
Sims, Donna R.	496-44-9063	0264	02/10/92	51	U	TL
Trout, Rhonda	125-66-5762	0165	02/10/92	51	U	TL
Wiles, Patricia J.	495-44-1849	0320	02/10/92	51	U	TL
Willis, Allie M.	494-42-7648	0151	02/10/92	51	U	TL
Wesser, Lula D.	368-38-6279	0286	02/11/92	51	U	TL
York, Marion M.	493-84-7974	0354	02/11/92	51	U	TL
McLendon, Marion	258-19-9837	0846	02/12/92	51	U	TL
Baker, Martha J.	486-72-7766	0101	02/13/92	51	U	TL
Cousart, Edna R.	245-80-1810	0364	02/17/92	51	U	TL
Davis, Petriva L.	489-74-2612	0363	02/17/92	51	U	TL
Gilbert, Peggy S.	005-60-8983	0550	02/17/92	51	U	TL
Hicks, Grace C.	500-54-4780	0199	02/17/92	51	U	TL
Kelley, Katie	355-46-7720	0364	02/17/92	51	U	TL
Kelley, Patricia K.	489-92-3418	0197	02/17/92	51	U	TL
Kissinger, Inis L.	493-34-0991	0101	02/17/92	51	U	TL
Newkirk, Dorothy	486-34-1663	0363	02/17/92	51	U	TL
Rice, Phyllis	491-66-6120	0363	02/17/92	51	U	TL
Rollins, Diana D.	498-82-4555	0155	02/17/92	51	U	TL
Stricklan, Brenda S.	489-56-8447	0281	02/17/92	51	U	TL
Thompson, Charolett J.	483-80-5962	0119	02/17/92	51	U	TL
Wagoner, Linda M.	442-60-7544	0261	02/17/92	51	U	TL
Alexander, Sherry L.	492-70-8596	0846	02/20/92	38	U	TT
Roberts, Karen	228-82-2955	0200	02/21/92	51	U	TL
Sharp, Caroline	510-66-7782	0173	02/21/92	51	U	TL
Adkins, Mary A.	492-58-5358	0261	02/24/92	51	U	TL

Akery, Henrietta A.	487-40-2723	0151	02/24/92	51	U	TL
Alexander, Sally M.	495-44-6686	0157	02/24/92	51	U	TL
Baker, Ida F.	486-34-1854	0102	02/24/92	51	U	TL
Beal, Dianna L.	486-74-4937	0102	02/24/92	51	U	TL
Beal, Georgia A.	499-42-4223	0156	02/24/92	51	U	TL
Beauchamp, Dolores V.	494-38-0765	0261	02/24/92	51	U	TL
Beauchamp, Patricia	500-44-3376	0261	02/24/92	51	U	TL
Becker, Eva Mae	489-34-3754	0264	02/24/92	51	U	TL
Bell, Linda J.	404-58-6809	0157	02/24/92	51	U	TL
Bowman, Kimberly D.	493-80-0601	0113	02/24/92	51	U	TL
Bryant, Pamela D.	497-84-4647	0199	02/24/92	51	U	TL
Byrd, Patricia L.	491-64-4533	0261	02/24/92	51	U	TL
Colby, Dolores L.	218-32-8993	0156	02/24/92	51	U	TL
Cupp, Colleen K.	273-66-8645	0209	02/24/92	51	U	TL
Duncan, Martha J.	491-62-7494	0245	02/24/92	51	U	TL
Filley, Wesley J.	486-30-0577	0416	02/24/92	51	U	TL
Foster, Virginia M.	487-46-8952	0261	02/24/92	51	U	TL
Fritchey, Pauline A.	494-34-5964	0199	02/24/92	51	U	TL
Glick, Jenny L.	286-24-7096	0190	02/24/92	51	U	TL
Gruder, Brenda S.	493-68-7456	0264	02/24/92	51	U	TL
Hughes, Sheryl S.	499-68-2830	0167	02/24/92	51	U	TL
Humphrey, Shirley	490-44-0206	0101	02/24/92	51	U	TL
Hurst, Sharon L.	546-76-5796	0258	02/24/92	51	U	TL
Kelley, Sandra K.	492-72-8555	0264	02/24/92	51	U	TL
Lane, Virgie R.	509-40-1181	0173	02/24/92	51	U	TL
Lankford, Hyon H.	492-92-4307	0209	02/24/92	51	U	TL
Mayo, Yuvonda F.	499-70-8006	0264	02/24/92	51	U	TL
Miller, Anna M.	497-32-6582	0261	02/24/92	51	U	TL
Parker, Sandra S.	500-82-3907	0155	02/24/92	51	U	TL

Employee Name	Employee Number	Dept	Last Day Wk	Reason	Union	Status
Peterson, Elizabeth	385-38-6269	0171	02/24/92	51	U	TL
Prock, Carolyn S.	487-64-2600	0157	02/24/92	51	U	TL
Reedy, Brenda K.	492-58-1666	0156	02/24/92	51	U	TL
Rollins, Brenda S.	495-76-8732	0165	02/24/92	51	U	TL
Russell, Mollie L.	409-98-2208	0155	02/24/92	51	U	TL
Sears, Gail L.	493-74-8826	0264	02/24/92	51	U	TL
Singleton, Fannie	402-02-5816	0190	02/24/92	51	U	TL
Stricklan, Karen	500-56-3289	0151	02/24/92	51	U	TL
Strickland, Patricia	491-60-0349	0155	02/24/92	51	U	TL
Vanscoy, Wanda J.	494-42-7758	0152	02/24/92	51	U	TL
Vineyard, Darlene E.	494-60-5105	0154	02/24/92	51	U	TL
Wagoner, Dawn L.	411-96-2811	0251	02/24/92	51	U	TL
Woodhodsky, Shirley M.	489-46-2450	0150	02/24/92	51	U	TL
Wray, Jean M.	491-34-4032	0173	02/24/92	51	U	TL
Wyss, Betty J.	488-38-0515	0261	02/24/92	51	U	TL
Yoakum, Deana S.	498-82-4288	0117	02/24/92	51	U	TL
Heinze, Jacqueline E.	494-46-9080	0261	02/28/92	51	U	TL
Leymaster, Melba S.	500-56-3020	0200	02/28/92	51	U	TL
Messersmith, Rita A.	488-60-3750	0286	02/28/92	51	U	TL
Sinden, Paul J.	487-82-7045	0499	02/28/92	38	U	TL
Yoakum, Margaret V.	224-88-6385	0200	02/28/92	51	U	TL
Baker, Angela R.	499-60-9508	0313	03/02/92	51	U	TL
Barber, Deborah D.	491-62-5845	0151	03/02/92	51	U	TL
Beasley, Sheila D.	493-70-8843	0286	03/02/92	51	U	TL
Cox, Alice D.	489-44-8812	0208	03/02/92	51	U	TL
Crane, Tammy	497-80-3800	0371	03/02/92	51	U	TL
Davis, Charline	489-48-5440	0264	03/02/92	51	U	TL
Emmons, Glenda K.	494-88-1878	0208	03/02/92	51	U	TL

Garner, Suzanne	320-32-9815	0286	03/02/92	51	U	TL
Gilbert, Richard B.	494-84-7468	0208	03/02/92	51	U	TL
Gunther, Josefine M.	567-31-1674	0315	03/02/92	51	U	TL
Harlan, Lola F.	492-40-0584	0150	03/02/92	51	U	TL
Hornbrook, Rosalinde H.	260-92-7717	0381	03/02/92	51	U	TL
Lawson, Sandra J.	493-58-8339	0400	03/02/92	51	U	TL
Messersmith, Martha F.	486-34-1290	0245	03/02/92	51	U	TL
Nelson, Carolyn S.	495-58-0056	0176	03/02/92	51	U	TL
Provancha, Alonzo F.	488-74-8517	0303	03/02/92	51	U	TL
Rea, Helen J.	287-38-3292	0286	03/02/92	51	U	TL
Rector, Brenda	486-70-5705	0286	03/02/92	51	U	TL
Rollins, Judith A.	494-46-9203	0101	03/02/92	51	U	TL
Schaffner, Myra K.	487-66-2954	0304	03/02/92	51	U	TL
Sharp, Dorothy	487-40-9140	0162	03/02/92	51	U	TL
Simpson, Alice F.	495-64-9646	0304	03/02/92	51	U	TL
Spurgeon, Elsie M.	544-38-1798	0267	03/02/92	51	U	TL
Tilley, Patricia P.	493-84-7989	0176	03/02/92	51	U	TL
Warnol, Kathryn L.	486-52-1304	0176	03/02/92	51	U	TL
White, Sandra D.	495-64-9634	0167	03/02/92	51	U	TL
Wilson, Ruth M.	495-30-4912	0199	03/02/92	51	U	TL
Wyss, Cindy A.	492-70-8834	0200	03/02/92	51	U	TL
Lawson, Mary A.	487-46-9057	0265	03/03/92	51	U	TL
Sherrell, Jerri R.	547-82-0106	0264	03/03/92	51	U	TL
Warnol, Barbara V.	358-34-5107	0276	03/03/92	51	U	TL
Godfrey, Betty J.	497-74-3666	0176	03/04/92	51	U	TL
McKinnon, Teresa A.	494-76-4124	0100	03/05/92	51	U	TL
Roberts, Erika	525-27-8103	0868	03/06/92	51	U	TL
Wagner, Kimberly L.	494-84-0127	0409	03/06/92	51	U	TL
Akery, Laverne	491-36-7350	0265	03/09/92	51	U	TL

Employee Name	Employee Number	Dept	Last Day Wk	Reason	Union	Status
Alexander, Tina L.	497-90-0412	0498	03/09/92	51	U	TL
Asberry, Victoria E.	491-62-5805	0499	03/09/92	51	U	TL
Baker, Iva M.	486-34-1844	0353	03/09/92	51	U	TL
Brewer, Alan D.	062-48-1236	0401	03/09/92	51	U	TL
Cochran, Eula M.	499-40-1217	0332	03/09/92	51	U	TL
Doyel, Lawrence T.	495-52-4376	0409	03/09/92	51	U	TL
Doyle, Betty I.	487-40-8442	0264	03/09/92	51	U	TL
Doyle, Susan K.	493-58-6950	0409	03/09/92	51	U	TL
Dull, Patty J.	496-70-2277	0409	03/09/92	51	U	TL
Ethington, Cathy M.	496-70-1182	0409	03/09/92	51	U	TL
Fritchey, Sandra S.	500-76-6099	0363	03/09/92	51	U	TL
Hilburn, Leokadia A.	496-62-2721	0363	03/09/92	51	U	TL
Jones, Carrie A.	462-45-9867	0498	03/09/92	51	U	TL
Lane, William	499-40-7795	0416	03/09/92	51	U	TL
Lawson, Lee F.	520-58-9573	0416	03/09/92	51	U	TL
McKinney, Mitchell L.	491-82-0560	0499	03/09/92	51	U	TL
Moore, Kimberly L.	499-82-9571	0371	03/09/92	51	U	TL
Roberts, Sarkis V.	487-54-1783	0416	03/09/92	51	U	TL
Robertson, Virginia	497-52-1954	0402	03/09/92	51	U	TL
Rollins, Kimberly M.	491-74-3926	0346	03/09/92	51	U	TL
Rollins, Troy K.	496-74-5639	0409	03/09/92	51	U	TL
Rollins, William R.	491-60-0632	0416	03/09/92	51	U	TL
Sharp, Samuel R.	490-70-2158	0402	03/09/92	51	U	TL
Sims, Greg A.	493-78-5270	0409	03/09/92	51	U	TL
Sinden, Stephanie L.	205-56-2830	0497	03/09/92	51	U	TL
Slone, Judy K.	487-64-6732	0409	03/09/92	51	U	TL
Spurgeon, Bob E.	497-82-6834	0409	03/09/92	51	U	TL
Steen, Margie L.	490-44-2364	0100	03/09/92	51	U	TL

Stroburg, Charles E.	496-62-3445	0021	03/09/92	51	U	TL
Tindle, Patricia D.	418-04-5876	0363	03/09/92	51	U	TL
Wilson, Dee L.	489-82-3119	0498	03/09/92	51	U	TL
Yoakan, Sharron K.	497-62-4073	0499	03/09/92	51	U	TL
Alexander, Tina S.	498-84-6319	0553	03/10/92	51	U	TL
Allen, Tammy R.	487-86-4306	0542	03/10/92	51	U	TL
Asberry, Leona	489-30-7701	0868	03/10/92	51	U	TL
Barnhart, Shannon G.	490-60-4374	0804	03/10/92	51	U	TL
Beasley, Dennis	497-64-8290	0578	03/10/92	51	U	TL
Beasley, Michael	486-76-6676	0499	03/10/92	51	U	TL
Beasley, Tammy L.	488-82-4581	0261	03/10/92	51	U	TL
Brown, Glenda M.	499-72-1365	0553	03/10/92	51	U	TL
Burnett, Shannon G.	497-80-7299	0804	03/10/92	51	U	TL
Burnett, Wilma J.	318-40-0268	0550	03/10/92	51	U	TL
Davis, Beth	491-74-4506	0553	03/10/92	51	U	TL
Demann, Melissa L.	498-96-9376	0846	03/10/92	51	U	TL
Doyle, Donna J.	486-34-0366	0553	03/10/92	51	U	TL
Edwards, Raymond E.	487-64-6450	0553	03/10/92	51	U	TL
Farquhar, Russell G.	491-66-7346	0553	03/10/92	51	U	TL
Foreit, Joyce L.	207-32-8611	0846	03/10/92	51	U	TL
Foster, Carol J.	490-52-1963	0542	03/10/92	51	U	TL
Foster, Joseph	491-46-1651	0542	03/10/92	51	U	TL
Gallaway, Judy O.	272-40-0446	0846	03/10/92	51	U	TL
Gardner, Kimberly	490-64-8938	0804	03/10/92	51	U	TL
Gilbert, Emmitt	499-38-4682	0553	03/10/92	51	U	TL
Holleman, Helen A.	496-48-4739	0578	03/10/92	51	U	TL
Kelley, Karen D.	496-78-8867	0846	03/10/92	51	U	TL
Maddox, Daisy L.	162-54-2493	0550	03/10/92	51	U	TL
McClendon, D. E.	494-48-4076	0578	03/10/92	51	U	TL

Employee Name	Employee Number	Dept	Last Day Wk	Reason	Union	Status
Mitchell, Alice E.	489-48-5967	0550	03/10/92	51	U	TL
Nelson, Jerry D.	489-42-9474	0432	03/10/92	51	U	TL
Plotner, Eugenia S.	487-64-6438	0846	03/10/92	51	U	TL
Ray, Sharon K.	499-44-8803	0846	03/10/92	51	U	TL
Rhew, Debbie	432-08-2682	0200	03/10/92	51	U	TL
Robbins, Linda M.	491-60-0319	0804	03/10/92	51	U	TL
Robertson, Clifford	491-46-1834	0499	03/10/92	51	U	TL
Rollins, Judy A.	498-48-8805	0846	03/10/92	51	U	TL
Rollins, Virginia R.	490-44-1187	0821	03/10/92	51	U	TL
Russell, Norma	491-24-1986	0803	03/10/92	51	U	TL
Sharp, Randel	500-66-3342	0499	03/10/92	51	U	TL
Sherrell, Mary K.	500-58-6525	0553	03/10/92	51	U	TL
Sneed, Melissa C.	487-88-6299	0846	03/10/92	51	U	TL
Stricklan Jerry R.	495-56-0248	0499	03/10/92	51	U	TL
Teel, Phyllis J.	499-48-8915	0868	03/10/92	51	U	TL
Tucker, Linda J.	494-48-3705	0517	03/10/92	51	U	TL
Ward, Karin L.	430-43-9802	0819	03/10/92	51	U	TL
Watson, Paula K.	500-78-1320	0846	03/10/92	51	U	TL
Wolff, Diane	498-86-2023	0542	03/10/92	51	U	TL
Alexander, Del R.	488-82-3270	0863	03/11/92	51	U	TL
Anderson, Etta W.	488-38-4735	0806	03/11/92	51	U	TL
Blackburn, Marlene	492-76-1847	0846	03/11/92	51	U	TL
Bruff, Deborah A.	486-62-5404	0804	03/11/92	51	U	TL
Copeland, Lewis D.	491-32-9030	0035	03/11/92	51	U	TL
Davis, Leann R.	495-84-7710	0804	03/11/92	51	U	TL
Decker, Belinda R.	389-84-3987	0806	03/11/92	51	U	TL
Denton, Ruth E.	489-42-7751	0805	03/11/92	51	U	TL
Edwards, Shirley S.	492-40-0936	0805	03/11/92	51	U	TL

Jones, Viola	492-46-0936	0810	03/11/92	51	U	TL
Kizer, Shirley J.	494-38-1856	0809	03/11/92	51	U	TL
Massey, Pamela	488-72-0336	0846	03/11/92	51	U	TL
McClendon, Patricia L.	493-58-8303	0863	03/11/92	51	U	TL
Null, Heather A.	494-70-4038	0846	03/11/92	51	U	TL
Prater, Vera L.	494-38-0463	0848	03/11/92	51	U	TL
Rollins, Betty J.	491-62-6176	0805	03/11/92	51	U	TL
Tillman, Barbara A.	495-54-9128	0800	03/11/92	51	U	TL
Vanover, Cheryl J.	447-60-1323	0806	03/11/92	51	U	TL
Wilson, Lisa C.	500-78-2318	0806	03/11/92	51	U	TL
Withers, Thelma	493-38-7080	0800	03/11/92	51	U	TL
Duncan, Bobbi A.	487-86-4304	0542	03/13/92	51	U	TL
Gilbert, Edythe L.	489-54-3937	0184	03/13/92	51	U	TL
Jennings, Goldie J.	489-48-6405	0165	03/13/92	51	U	TL
Rollins, Cora M.	499-42-2818	0155	03/13/92	51	U	TL
Routh, Melissa J.	402-02-7180	0804	03/13/92	51	U	TL
Sinden, Viola F.	500-46-9230	0261	03/13/92	51	U	TL
McKinney, Margaret A.	499-66-6790	0439	03/16/92	51	U	TL
Gilbert, Emmitt D.	499-72-6956	0409	03/19/92	51	U	TL
Gilbert, George P.	494-84-6542	0358	03/19/92	51	U	TL
Lafollette, Daniel N.	276-40-7192	0409	03/19/92	51	U	TL
Feeler, Jeffrey J.	233-08-4223	0031	03/26/92	51	U	TL
Henson, Lloyd	491-38-8973	0035	04/01/92	51	U	TL
Irons, Jr, Glen R.	262-51-2692	0039	04/02/92	51	U	TL
Odom, David W.	490-64-7950	0024	04/02/92	51	U	TL
Rea, Lowell E.	295-34-9275	0033	04/02/92	51	U	TL
Schaffner, James R.	496-58-2616	0039	04/02/92	51	U	TL
McKinnon, Mark S.	496-72-5533	0039	04/03/92	51	U	TL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:92CV01134ELF

UNITED FOOD AND COMMERCIAL WORKERS UNION
LOCAL 751, AS REPRESENTATIVE OF THE
AGGRIEVED EMPLOYEES,
Plaintiff,

v.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY,
Defendant.

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Comes now Defendant, BROWN GROUP, INC. d/b/a BROWN SHOE COMPANY, by and through its attorneys, pursuant to Rule 12 of the Federal Rules of Civil Procedure and moves to dismiss Plaintiff's Complaint in its entirety for the following reason:

Plaintiff's Complaint is subject to Rule 12 dismissal for lack of subject matter jurisdiction inasmuch as Plaintiff, as an association, lacks standing under applicable Supreme Court and Courts of Appeals precedent to litigate the above-entitled cause wherein it seeks monetary damages for individual members beyond the terms of the collective bargaining agreement.

WHEREFORE, Defendant Brown Group, Inc., d/b/a Brown Shoe Company prays that an order of dismissal of Plaintiff's Complaint be entered with an award to Defend-

ant of its attorneys' fees and costs incurred in the defense of this matter.

Respectfully submitted,

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LINIHAN, CODY & McCARTHY

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[Filed Apr. 22, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title Omitted in Printing]

MOTION TO ALTER OR AMEND THE JUDGMENT

COMES NOW Plaintiff pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and moves the Court to alter or amend its judgment in this case by either withdrawing its Order dated April 12, 1993 dismissing the complaint without prejudice and allowing the suit to proceed, as pleaded, due to the special nature of the relationship of a labor organization, such as plaintiff, and its members created under the Labor Management Relations Act (29 U.S.C. § 141 et seq.) and recognized by Congress in 29 U.S.C. § 2104(5); or by withdrawing its Order dated April 12, 1993 and substituting an Order granting plaintiff 30 days to file and amended complaint seeking declaratory relief and adding affected individuals as parties to this action.

In support of this motion plaintiff respectfully refers the Court to plaintiff's memorandum in support.

Respectfully submitted,

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Attorneys for Plaintiff United
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Union Local 751

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that United Food and Commercial Workers Union Local 751, as representative of the aggrieved employees of Brown Shoe Company's former Dixon, Missouri plant, the Plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Eighth Circuit from an order of this court, denying Plaintiff's motion to alter or amend its judgment granting a motion to dismiss the action without prejudice based on the court's determination that the Plaintiff lacked standing under the Worker Adjustment Retraining and Notification Act ("WARN"), 29 U.S.C. §§ 2201 to 2109, to pursue its claim entered in this action on the 7th day of March, 1994.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title Omitted in Printing]

MOTION TO AMEND NOTICE OF APPEAL

Comes now plaintiff, by counsel, and moves this Court for leave to file an amended notice of appeal clearly stating that plaintiff is appealing not only from the Court's Order dated March 7, 1994 denying plaintiff's motion to alter or amend the judgment, but also from the Memorandum and Order dated April 12, 1993 dismissing this action for lack of standing.

In support of this motion, plaintiff refers the Court to its memorandum submitted herewith.

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Attorneys for Plaintiff United
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Union Local 751

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Supreme Court, U.S.
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No. 95-340

CORRECTED COPY

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 751,
Petitioner,
v.
BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Do Article III standing requirements preclude a federal court from giving effect to Congress' express statutory authorization permitting an exclusive "representative" of the "affected employees" to assert the monetary claims of the represented "affected employees" under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-340

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 751,
Petitioner,

v.

BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

**On a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 50 F.3d 1426 and is reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at pp. 1a-12a. The Order of the Court of Appeals denying the Union's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at Pet. App. 20a. The opinion of the United States District Court for the Eastern District of Missouri granting defendant Brown Group, Inc.'s Motion to Dismiss is reported at 820 F. Supp. 1192 and is reprinted at Pet. App. 13a-15a. The opinion of the District Court denying the Union's Motion to Alter or Amend the Judgment is unreported and is reprinted at Pet. App. 16a-19a.

JURISDICTION

The Eighth Circuit issued its decision and judgment herein on April 3, 1995. The court below then denied a timely Petition for Rehearing and Suggestion for Rehearing En Banc on May 25, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Worker Adjustment and Retraining Notification Act ("WARN") provide:

§ 2(a)(4), 29 U.S.C. § 2101(a)(4):

> the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45.

§ 3(a), 29 U.S.C. § 2102(a):

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—
>
> (1) to each representative of the affected employees as of the time of notice or, if there is no such representative at that time, to each affected employee. . .

§ 5, 29 U.S.C. § 2104:

> (a)(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

> (ii) the final regular rate received by such employee; and
>
> (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred. . . .
>
> (5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.
>
> (b) The remedies provided for in this section shall be the exclusive remedy for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

STATEMENT OF THE CASE

The Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101-09, provides that covered employers may not order a "plant closing or mass layoff," as statutorily defined (29 U.S.C. § 2101(a)(2) & (3)), without providing notice sixty days beforehand "to each *representative of the affected employees* at the time of the notice or, if there is no such representative at that time, to each affected employee." 29 U.S.C. § 2102(a) (emphasis supplied). "Representative" is defined in the statute as "an exclusive representative of employees within the meaning of section 159(a) or 158(f) of [the National Labor Relations Act (NLRA)] . . ."

The WARN Act goes on to provide (a) that if an employer "orders a plant closing or mass layoff in violation of section 2102," the employer is liable "to each aggrieved

employee who suffers an employment loss" for back pay and benefits, (29 U.S.C. § 2104(a)(1)); and (b) that "a person seeking to enforce such liability, *including a representative of employees* . . . aggrieved under paragraph (1) . . . may sue" in district court (29 U.S.C. § 2104(a)(5) (emphasis supplied)).

On January 17, 1992, Brown Group, Inc. d/b/a Brown Shoe Co. ("Brown Shoe") mailed a written notice to William R. Treece of the United Food and Commercial Workers International Union ("International") which announced that Brown Shoe's Dixon, Missouri plant would permanently close and 277 employees would be discharged as a result of the closing. Brown Shoe stated in the letter that the Company would begin discharging employees on March 20, 1992. Brown Shoe already had begun discharging employees before sending the January 17 notice, discharged additional employees on January 20, 1992, and continued to discharge employees during February and March, 1992. Joint Appendix ("J.A.") 9.[1]

On June 16, 1992, United Food and Commercial Workers Union Local 751, Missouri ("Local 751" or the "Union"), petitioner herein, filed a complaint in the United States District Court for the Eastern District of Missouri, alleging that Local 751 was the "exclusive representative of the [Dixon] employees" on January 17, 1992, and at all other times material to the complaint, as defined in 29 U.S.C. § 2101(a)(4). Jurisdiction was alleged under 28 U.S.C. § 1331 and 29 U.S.C. § 2104(a). A copy of the then current collective bargaining agreement between Local 751 and Brown Shoe was attached to the complaint. The Union also alleged that it was Local 751, not William Treece or the International, that had a right to notice of the Dixon closing sixty days before the closing was ordered in accordance with 29 U.S.C. § 2102(a)(1), and that Brown Shoe had in any

[1] Because the courts below dismissed this case on the pleadings, the facts are recited as they appear in the complaint.

event failed to continue the employment of most of the represented employees for a sixty-day period following the notice. An appendix to the complaint identified those Dixon employees who are aggrieved employees under 29 U.S.C. § 2104(a). J.A. 7-10 (Complaint); 11-61 (Collective Bargaining Agreement); 62-63 (Brown Shoe Letter); 64-73 (List of Employees).

The complaint demanded that: (1) Brown Shoe pay each aggrieved employee back pay and fringe benefits for each day of employment loss the employee suffered prior to the expiration of the sixty-day notice period; (2) Local 751 recover from Brown Shoe the cost of this action, including reasonable attorneys' fees; and (3) Local 751 recover such other and further relief on its behalf and that of the aggrieved employees as may be proper. J.A. 9-10.

On April 12, 1993, the District Court issued a memorandum and order granting Brown Shoe's motion to dismiss on the ground that the Union lacked standing to sue for damages for the represented employees. Pet. App. 13a. Local 751 thereupon filed a motion to alter or amend judgment asking leave to file an amended complaint seeking declaratory relief and adding the affected employees as parties. That motion was denied by the District Court on March 7, 1994. Pet. App. 16a.

On appeal, the Eighth Circuit affirmed the District Court's standing ruling. The Court of Appeals recognized that Local 751 is a statutory "representative" of the aggrieved employees. But the court below held that while the Union "is entitled to bring suit under the WARN Act, [] it does not necessarily follow that the union has standing." Pet. App. 4a.

The Court of Appeals went on to hold that although the failure to provide an adequate, timely notice to Local 751, as required by the statute, may "allege[] an injury to the union itself . . . that is concrete and actual" (Pet. App. 6a), the Union does not have standing on that

basis. The statutory remedy for inadequate notice to the Union—back pay and benefits for aggrieved employees—said the Eighth Circuit, "would do nothing to remedy the alleged failure of notice to the UFCW." Pet. App. 7a. The court below, moreover, concluded that Local 751 did not have standing to assert the right of the employees the Union represents to monetary relief, relying on the third prong of the associational standing test articulated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)—*viz.*, whether "the claim asserted [or] the relief requested requires the participation of individual members in the lawsuit." Pet. App. 9a-11a. Finally, the Court of Appeals affirmed the district court's denial of leave to amend the complaint. Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

I. Where a standing issue arises in a federal case between two *private parties* the pertinent question—and the only pertinent question—is whether the case will be "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). In making this determination, the initial task in a case brought under a statute is to determine whether the statute itself authorizes the plaintiff to bring a lawsuit of the kind before the court.

Here, the WARN Act specifically authorizes unions as exclusive representatives of the affected employees to bring suit where the employer fails to provide the notice *to the union* mandated by the statute in the event of a plant closing or mass layoff, and specifically provides as the only remedy to the union in such a lawsuit recovery on behalf of the represented employees of statutory monetary payments. Those payments are in the nature of liquidated damages, designed in part to deter employer violations and in part to compensate the group of employees represented by the union for the lost opportunity to respond effectively to the plant closing or mass layoff. Providing monetary relief payable to the affected employees where the union sues for a violation suitably redresses the injury to the union by reason of the violation since that right was created to facilitate the union's role in aiding and assisting the represented employees adversely affected by the closing or layoff.

Given this statutory structure, there is no doubt that the union in this case has standing. Where there is a specific statutory grant of litigating authority such as that here, the only pertinent standing limitations are those derived directly from Article III of the Constitution. *Warth v. Seldin*, 422 U.S. 490, 500-501 (1975). The bedrock Article III requirement is that the litigant "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The WARN Act statutory scheme alone is sufficient to demonstrate that each aspect of this Article III standard is met here.

In particular, where there is a common law or statutory legal duty owed to the plaintiff which will, if carried out, enable the plaintiff to advance a third party's interests, and the defendant breaches that duty, the law recognizes that a suit by the plaintiff pursuing relief, monetary, individualized, or otherwise, that redounds to the financial benefit of the third party is one that is appropriate for judicial resolution. Third party beneficiary cases, for example, have precisely that structure, as do cases in which the government is accorded statutory authority to sue for relief for individuals and cases brought by unions under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to recover for represented employees the wages and working conditions provided for in a collective bargaining agreement on an employer breach of the agreement. *International Union UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 699-700 (1966). In all of these in-

stances, given the precise nature of the legal duty owed to the plaintiff and the consequent injury caused by its breach, it has always been recognized that monetary relief for the benefit of third parties *will* redress the plaintiff's legal injury for the purposes of the standing doctrine.

II. The Eighth Circuit in analyzing this case ignored the point that the employer's legal duty ran to the union, not to the affected employees individually. As just noted, that point decides this case. Even on its own terms, however, the Eighth Circuit was wrong. The statutory designation of unions as representatives authorized to bring a WARN Act suit on behalf of affected employees (as well as for many other purposes under both this statute and the federal labor laws) is one of those designations—recognized as proper in the federal courts—"by statute or the settled practice of the courts, [through which] the plaintiff is permitted to sue for the benefit of another." *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406 (1900). Such designations are typically bounded by common law or statutory criteria governing the appointment of the representative as well as by some duty of the kind imposed on fiduciaries to provide for adequacy of representation. The WARN Act designation of unions which are representatives of employees under the federal labor laws as statutory representatives under the WARN Act itself shares those characteristics. That being so, all the requirements recognized in this Court's standing jurisprudence are met in this case.

Against this background, the Eighth Circuit erred in treating this case as part of the "associational standing" line of cases. Those cases are only one subcategory of the larger category of "representational standing" cases. Associational standing is concerned with the situation in which the association in question has not been recognized as a representative for litigation purposes by any statutory or common law scheme, but relies instead on the voluntary relationship between the association and its members for authority to represent its members in litigation. It is

only in the associational standing cases that the Court has been required to develop its own prudential criteria as to when such implicit representation will be recognized. When, as here, the authorization to bring suit is made by law rather than by self-designation, those criteria have no application. Rather, in the authorized representative cases the standing question comes down to whether the represented individuals have suffered an injury in fact. And the WARN Act statutory scheme shows that the answer to that question is "yes."

ARGUMENT

Introduction

Last term, this Court summarized the substantive and enforcement provisions of the WARN Act as follows:

> With some exceptions and conditions, WARN forbids an employer of 100 or more employees to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2102(a). The employer is supposed to notify, among others, "each affected employee" or "*each representative of the affected employees.*" 29 U.S.C. § 2102(a)(1). An employer who violates the notice provisions is liable for *penalties* by way of a civil action that may be brought "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business," § 2104(a)(5). The class of plaintiffs includes aggrieved employees (*or their unions, as representatives*), *ibid.*, who may collect "back pay for each day of violation," § 2104(a)(1)(A), "up to a maximum of 60 days," § 2104(a)(1). [*North Star Steel Co. v. Thomas*, —— U.S. ——, 115 S. Ct. 1927, 1929 (1995) (emphasis supplied).]

As this summary indicates, the WARN Act establishes an interrelated scheme of substantive requirements and enforcement provisions specifically providing that unions chosen as employee representatives pursuant to the federal

labor laws governing collective bargaining retain that representative role for WARN Act purposes, *including* for purposes of bringing suits that provide the statutory "back pay" remedy for violation of the notice provision. *See* 29 U.S.C. § 2101(a)(4) (defining "representative" as "an exclusive representative of within the meaning [the National Labor Relations Act] or the [Railway Labor Act].")

The statute itself on its face thus provides a specific Congressional answer to the fundamental question raised by the standing inquiry in the federal courts, *viz.*, "whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). The issue presented by this case is whether, as the Eighth Circuit held, Congress is on some basis precluded by the "case or controversy" requirement of Article III of the Constitution from so providing.

In *North Star Steel*, of course, this Court proceeded on the understanding that there is *no* such limitation on Congress' authority to structure a statutory scheme along the lines of the WARN Act for delineating rights and duties and prescribing remedies and enforcement procedures. One of the two consolidated cases there was brought by a union and sought to recover the applicable statutory monetary relief for the employees the union represented. *Crown Cork & Seal Co. v. United Steelworkers of America*, Supreme Court No. 94-835. Yet the Court suggested no disquiet with the union's standing in its opinion even though the standing issue had been raised at oral argument (1995 WL 311715, Oral Argument, at p. 11) and would, of course, have been jurisdictional if meritorious. *See National Organization for Women Inc. v. Scheidler*, —— U.S. ——, 114 S. Ct. 798, 802 (1994).

That understanding could not have been more correct. The instant case, on its face—and, as we will show, at its core--is a straightforward "case or controversy" of a kind long recognized by the law.

The plaintiff union, a private party, has, by reason of its status, a federal statutory right to a notice from the defendant employer, also a private party, when the defendant formulates an intent to act in a manner that affects the plaintiff's interests. The notice is designed to enable the plaintiff to respond by initiating a course of conduct that protects and advances those interests. The complaint here alleges that the defendant formulated the requisite intent—and, indeed, acted on it—and that the defendant did so without providing the plaintiff the requisite notice, thereby violating the plaintiff's statutory rights and causing the plaintiff legal injury. And, the complaint seeks the remedy the statute provides to redress such violations.

This case is thus a classic private lawsuit for a specific, concrete violation of a statutorily created right. It is not a lawsuit raising a constitutional claim or a challenge to government action that diverges from the historic "case or controversy" paradigm and by reason of that divergence tests the limits of our litigation system, or of our tripartite government structure, or of our federalism. Indeed, in this case, any separation of powers concerns cut squarely in the direction of *upholding* Congress' legislative power to create the entirely rational scheme for enforcing a statutory obligation running from one set of private parties to another. *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (since "Congress is a co-equal branch of government" the Court "accords 'great weight to the decisions of Congress'" when those decisions are constitutionally challenged).

The only complexity here is that the private, statutory right in question runs to the plaintiff as—and because of—its status as a *representative* of a discrete group of individuals—the defendant's employees—and that precisely because of the representative nature of the notice right and the employee protective purpose served by that right, the sole statutory remedy for the violation takes the form of required monetary payments by the defendant to those employees.

The courts below proceeded on the theory that Article III of the Constitution generates two absolute rules: (a) that lawsuits brought by A, a rights holder, against B, an alleged violator of A's rights, in which monetary relief on a finding of a violation is payable to C (or to C, D, E, etc.) are not justiciable "cases or controversies" because A lacks standing to prosecute the case; and (b) that Congress cannot, consistent with the standing requirement, designate a representative with authority to litigate on behalf of a group of individuals where the relief is monetary payments to those individuals.

The Eighth Circuit's conclusion in each of these regards is contrary to the continuous recognition in numerous legal contexts that such lawsuits through authorized representatives *are* justiciable "cases or controversies" and is wholly without foundation in this Court's "standing" jurisprudence. Very simply stated, where Congress creates a cause of action and provides a remedial scheme for violations like that here, providing for litigation through an authorized representative who itself is owed duties under the statute, the Congressional enactment itself is sufficient to establish the plaintiff's Article III standing.

I. The Plaintiff Union Has Article III Standing To Bring This WARN Act Suit, And To Seek The Monetary Remedy To Employees The Act Decrees, By Reason Of The Express Statutory Grant To The Union Of Litigating Authority To Vindicate The Union's Express Statutory Right To A Plant Closing Notice, And The Representational Nature Of That Notice Right.

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. . . . [*Warth v. Seldin*, 422 U.S. 490, 498 (1975).]

As such, the analytic distinction made in *Flast, supra*, 392 U.S. at 94-95 is very much in point here:

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case- and-controversy doctrine.

Because this is a federal case between two private parties and concerns an alleged violation of a federal statutory norm that is plainly a norm Congress has the Commerce Clause power to enact, the challenge to the plaintiff's standing is to be tested against whether the plaintiff's claim is presented in "an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast, supra*, 392 U.S. at 95.

A. The resulting Article III standing question does not arise—and is not to be considered—in the void, and without regard to the plaintiff's particular cause of action. Rather, as this Court has emphasized, any "inquiry as to standing must begin with a determination of whether the statute in question authorizes [the remedy sought] at the behest of the plaintiff." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). *See also International Primate Protection League v. Administrators of Tulane Education Fund*, 500 U.S. 72, 77 (1991), *quoting* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988) ("standing is gauged by the specific common-law, statutory or constitutional law claims that a party presents [and] 'should be seen as a question of substantive law, answerable by reference to the statutory . . . provision whose protection is invoked.' ").[2]

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[2] *See also* Fletcher, *The Structure of Standing, supra*, at 251 ("In the case of a statutory right, Congress is the source both

The statutory standing inquiry in federal cases is primary for three reasons:

First, only if Congress intended to permit the particular plaintiff to litigate the particular lawsuit does the plaintiff have standing, regardless of what the standing doctrine would otherwise permit. To put this another way, only where Congress has such an intent does any Article III question arise. *See, e.g., Director, Office of Workers' Compensation v. Newport News Shipbuilding & Drydock Co.*, —— U.S. ——, 115 S. Ct. 1278, 1286 (1995) (government official does not have standing to seek judicial review of an agency decision because the relevant statute does not so provide, even though "Congress *could* have conferred standing upon the Director without infringing Article III of the Constitution").

Second, statutory grants of litigating authority regarding a particular dispute "assume[] critical importance with respect to [the set of judge-made rules this Court has recognized and labelled] the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes." *Warth, supra*, 422 U.S. at 500.

To take an example directly relevant here, one of these nonconstitutional, "self-imposed, prudential limitations" is that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests . . ." *Warth, supra*, 422 U.S. at 44. At the same time, however, this Court has made it equally plain that where the Article III injury-in-fact minima are met, "the question whether the litigant is a 'proper party to request an adjudication of a particular issue' (*Flast v. Cohen, supra*, 392 U.S. at 100), is one within the power of Congress to determine," (*Sierra Club v. Morton, supra*, 405 U.S. at 732 n.3). *See also Warth, supra*, 422 U.S. at 501 ("[S]o long as this requirement [of a 'distinct and palpable injury'] is satisfied, persons to whom Congress has granted a right of action . . . may have standing to seek relief on the basis of the legal rights and interests of others"); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules' . . .")

Once it is determined that Congress has specifically authorized a particular class of lawsuits to go forward at the behest of a particular class of plaintiffs, then, the prudential standing limitations—such as the one implicated by the "proper party to request an adjudication" inquiry—drop out of the equation and the only pertinent standing principles are those that rest directly on the "case or controversy" requirement of Article III of the Constitution.

Finally, and as already foreshadowed, the legal rights, duties and remedies created by a federal statute form the stuff out of which the Article III principles emerge. Statutes shape the minimum, Article III injury-in-fact requirement, by, to take the most basic example, "creating legal rights, the invasion of which creates standing." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Warth, supra*, 422 U.S. at 500; *Havens Realty v. Coleman*, 455 U.S. 363, 373 (1982). Similarly, the related constitutional inquiry concerning whether the injury in question is likely to be redressed through the litigation turns on the nature and purpose of the remedial scheme established by the statute in question. *See Director, Office of Workers' Compensation, supra*, 115 S. Ct.

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of the legal obligation and of the definition of the class of those entitled to enforce it . . . So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them . . ."); Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, XVII Suffolk L. Rev. 881, 885 (1983) (the "existence [of standing] in a given case is largely within the control of Congress. . . . [L]egal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature.")

at 1286, citing and relying on *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 325 (1980) (statutes, such as Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2, that explicitly permit governmental standing to pursue a statutory violation in the public interest and provide for monetary relief payable to individuals do not infringe Article III).

B. All the foregoing being so, we turn to an analysis of the WARN Act and of its litigation scheme.

The WARN Act became law in 1988, long after the federally-created-and-regulated system governing employee workplace representation through a union was in place. The WARN Act added to the preexisting law limited statutory rights concerning plant closings and mass layoffs, actions which effectively terminate the employees' employment tenure and any collective bargaining agreement entered into on the employees' behalf by their exclusive representative. In making that addition, Congress determined that where the workforce has chosen an exclusive representative for collective bargaining as provided for in the National Labor Relations Act (NLRA) or Railway Labor Act (RLA) and a closing or mass layoff occurs, the protection of employee interests should continue to be entrusted to the statutory representative otherwise responsible for representing the employees with regard to their employment.

(1) *Statutory Representative*: The WARN Act therefore defines "representative" as the exclusive representative chosen by employees pursuant to the National Labor Relations Act or Railway Labor Act. 29 U.S.C. § 2101 (a)(4).

Such statutory representatives are "designated or selected [by the employees] in a unit appropriate for such purposes . . . for the purposes of collective bargaining in respect to rate of pay, wages, hours of employment, or other conditions of employment" and, as noted above, are the "exclusive" representative for such purposes. NLRA § 9(a), 29 U.S.C. § 159(a); *see also* RLA § 2, *Fourth*, 45 U.S.C. § 152, *Fourth*. The process for designating the exclusive representative—free selection by a majority of the employees, normally in a governmentally supervised secret ballot election—is specifically provided for by statute and administered by the National Labor Relations Board (and, in the case of the RLA, by the National Mediation Board). NLRA § 9, 29 U.S.C. § 159; RLA § 2, *Ninth*, 45 U.S.C. § 152, *Ninth*. It is therefore an unfair labor practice under the NLRA for an employer to recognize as an exclusive representative a union that has *not* been selected by the majority of the employees (NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2); *see also* RLA § 2, *Third & Fourth*, 45 U.S.C. § 152, *Third & Fourth*).[3] And, once a union is selected as an exclusive representative, the union owes the employees it represents a duty of fair representation, akin to the duty of a fiduciary or trustee to the individuals the fiduciary represents. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74 (1991) ("a union owes employees a duty to represent them adequately as well as honestly and in good faith"); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Conley v. Gibson*, 355 U.S. 41, 42 (1957).[4]

[3] Under NLRA § 8(f), 29 U.S.C. § 158(f), in the construction trades a union can be recognized as the exclusive collective bargaining representative before it is selected by a majority of the employees, but employees may petition at any time for a representation election under § 9(a). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).

[4] The WARN Act itself does not, to be sure, create any duty inhering in unions to file a 29 U.S.C. § 2104 suit alleging an employer violation and seeking the statutory remedy. Rather, the employees are free to file such a suit themselves. And, where employees are free to pursue their own interests in court, we are not aware of any cases in this Court holding that the duty of fair representation requires the union to bring suit, even where the construction of the applicable collective bargaining agreement is at stake.

The standing issue posed by this case, however, arises only when the union does bring suit in federal court. And, the developed law is that unions that are exclusive representatives and *do* undertake to exercise their representational authority on matters as to which that authority is nonexclusive *are* subject to the duty of fair representation in carrying out the representation affirmatively

Thus, a union's representative status under the WARN Act flows not from some internal associational relationship with its own members, but from its separate governmentally-established status as the "representative" for all the employees in a particular "appropriate bargaining unit."

(2) *Role Of The "Representative"*: After defining representative" for purposes of the WARN Act as the NLRA/RLA exclusive representative, Congress provided that employees who have a union representative are to receive the statutory notice of a plant closing or mass layoff *through notice to that representative*, rather than through notice to each employee individually. 29 U.S.C. § 2102(a)(1).

Supporters of the WARN Act repeatedly stressed that notice would provide employees with the opportunity for involvement in retraining and reemployment programs, both of which, studies showed, are more effective when instituted while the employees are still available as a group at the plant. *See, e.g.*, S. Rep. No. 62, 100th Cong., 1st Sess. (1987) at 12 (stressing that the primary purpose of notice is "to enroll workers in adjustment programs before they are laid off", while receipt of notice by individual employees who have no opportunity to participate in an organized program is only of limited value). *See also* H.R. Rep. No. 285, 100th Cong., 1st Sess. (1987), at 13 (same). The WARN Act proponents added that where there is union representation, such programs are much more likely to be instituted and to succeed if the union is an active participant. 133 CONG. REC. S9391 (daily ed. July 8, 1987) (remarks of Sen. Metzenbaum) ("It is easier to enroll workers in adjustment programs before they lose their jobs. It is easier to enlist

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undertaken. *Foust v. International Bhd. of Elec. Workers*, 572 F.2d 710, 717 (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42 (1979); *Nedd v. United Mine Workers*, 556 F.2d 190, 200 (3rd Cir. 1977) *cert. denied*, 434 U.S. 1013 (1978); *cf. Toensing v. Brown*, 528 F.2d 69, 70 (9th Cir. 1975); *Kesner v. NLRB*, 532 F.2d 1169, 1175 (7th Cir.), *cert. denied*, 429 U.S. 983 (1978).

unions and management as active participants before the plant or department store or other facility goes down").

Additionally, although the bill as finally passed did not mandate any form of consultation by the employer with employees or with their representatives regarding the plant closing beyond that required under the National Labor Relations Act, Congress recognized that even sixty days notice might in some instances provide an opportunity for negotiations concerning economic concessions or employee buyouts. S. Rep. No. 62, *supra*, 12 ("with time to plan ahead, it is sometimes possible to avoid layoffs altogether"). Again, where the employees have a union representative, such discussions are properly, under the National Labor Relations Act, conducted with the union, not with individual employees. *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U.S. 678 (1944).

As the foregoing indicates, Congress concluded that where there is a union representative, WARN Act notice is to be provided to the representative so that the union can assist employees in developing a coordinated, collective response to their common situation that mitigates the adverse impact of the plant closing on those employees.

(3) *Statutory Remedies*: Where the employer does not meet the obligation to provide sixty-days notice to the exclusive representative, Congress provided that the employer, for "violation of section 2102"—the section requiring notice to the union and not to the employees where there is an exclusive representative—shall be liable to "each aggrieved employee" for a statutorily-prescribed monetary amount measured by each employee's rate of pay and by the period of the violation. 29 U.S.C. § 2104(b). Thus, it is absolutely clear in the statute that in a case like this one the liability to individual employees is *the* statutory remedy for failure to provide notice *to the union representative*, and that no other rem-

edy is available to the union where the employer does not provide the requisite notice to the union.[5]

A predecessor to the WARN Act, reported by the House Committee on Education and Labor in 1985 but defeated on the floor (H.R. REP. No. 285, 100th Cong., 1st Sess. 12 (1988)), had provided expressly for the imposition of general or punitive damages. *See* H.R. REP. No. 336, 99th Cong., 1st Sess. 24 (1985); *see* 131 CONG. REC. H10213 et seq. (daily ed. Nov. 14, 1985) (eliminating general and punitive damages). The WARN Act as ultimately enacted, however, contains no such provision.

Similarly, provisions for injunctive relief contained in the 1985 version of the bill as reported (*see* H.R. REP. No. 99-336, *supra*) were deleted in the legislative process. *See* 131 CONG. REC. H10213 *et seq.* (daily ed. Nov. 14, 1985) (eliminating injunctive relief); Hearings on H.R. 1122, 99th Cong., 2d Sess. 139-40, 144-47 (1987) (remarks of Reps. Ford and Clay). Indeed, the final bill was amended shortly before enactment to make it absolutely clear that no injunctive relief is available. 29 U.S.C. § 2104(b) ("Under this Act, a Federal court shall not have authority to enjoin a plant closing or mass layoff"). *See* 134 CONG. REC. S8605 (daily ed. June 27, 1985) (remarks of Sen. Hatch) (demanding greater clarity regarding the unavailability of injunctions); S. 8610-1 (introduction by Sen. Hatch of amendment explicitly prohibiting injunctions and acceptance of the amendment).

The WARN Act's exclusive "back pay" remedy is, moreover, quite different from the back pay remedy provided by statutes such as Title VII and the National Labor

[5] In addition to notice to the union (or to the employees individually if there is no union representative), the WARN Act provides that notice must also be given to the "State dislocated worker unit" and to the chief elected official of that local government unit. 29 U.S.C. § 2102(a)(2). For violation of that obligation WARN provides for a "civil penalty" of $500 for each day of the violation. 29 U.S.C. § 2104(a)(4).

Relations Act. The prescribed rate of pay may be higher than the amount the employee would have received during the notice period. 29 U.S.C. § 2104(a)(1)(A)(i) & (ii) (the rate of compensation used to calculate liability is the "higher of" the average rate for the last three years or the final regular rate). There is no offset against that amount for the employee's actual earnings. *Id.* And, there is no requirement of employee mitigation of damages. *Id. Compare* 42 U.S.C. § 2000e-5(g) ("Interim earnings or amounts earnable with reasonable diligence" by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197-98 (1941) (same mitigation rule under the NLRA). An employer payment of contractually-required severance payments, moreover, does not serve to reduce the statutory amount due. 29 U.S.C. § 2104(2).

It is also clear, from the remedial provisions themselves as well as from the pertinent legislative history, that Congress imposed this monetary liability to induce compliance with the notice requirements, in a manner akin to an equitable remedy.

Congress' aim in these unusual provisions was to enact what "is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate damages proceedings." S. REP. No. 62, *supra*, 24. *See also* H.R. REP. No. 285, *supra*, 16 (the statute provides "economic incentives to encourage employers to provide early notification of mass layoffs and plant closings"); H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 1053 (1988) (describing employers' monetary liability to employees for violation of the notice provisions in detail, noting in particular that contractually-required severance payments are not offset because "[t]hese are benefits that are payable as compensation for past

services" and permitting an offset would not serve to deter statutory violations).[6]

Of particular note in this regard is the fact that the Senate rejected an amendment which would have explicitly provided that an employer can satisfy the statutory requirements by providing voluntary severance pay in lieu of notice. Before the vote rejecting the amendment, the primary supporter of the bill explained:

> We are not seeking to get workers paid because their plant is closing. We are trying to get them retrained. We are trying to put them back into the mainstream of the job market. If we wait to tell people they are losing their jobs until the day of the job loss, then . . . 75 percent will drift away without ever getting counseled or trained for a new job . . . [W]e just want notice. We are not asking for money. . . . *Our bill is about notice, not severance. And that is the key point.* [134 CONG. REC. S8548 (daily ed. June 25, 1988 (remarks of Sen. Metzenbaum, emphasis supplied); *see also id.*, S. 8693 (remarks of Sen. Metzenbaum) ("The Senator stands on the floor of this body to make it clear, that we are not looking for money, we are looking for fairness. We are looking for the decent thing to be done. We are looking to give the employees a chance to work.").]

As this Court in *North Star Steel* put it, echoing many members of Congress (both supporters and opponents of the final bill), the statutory monetary liability provisions

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[6] The WARN Act was originally a part of the Omnibus Trade Act, which was vetoed by the President. *See* H.R. Doc. No. 200, 100th Cong., 2d Sess. (1988), *reprinted in* 134 Cong. Rec. 12,130 (1988). The plant closing provisions were then separately reintroduced and passed (with a few minor amendments not here relevant). The principal sponsor of the WARN Act stated on the floor that the Conference Report on the Trade Act sets out Congress' intent in enacting the WARN Act. 134 Cong. Rec. 13,680-81 (1988) (remarks of Rep. Ford); *see also* 134 CONG. REC. H5504 (daily ed. July 13, 1988) (remarks of Reps. Jeffords and Clay).

in a sense provide for civil "penalties". 115 S. Ct. at 1929; *see, e.g.*, S. REP. No. 62, *supra* ("Penalties are provided for failure to comply with [the notice provisions]"); *id.* at 24 (purpose of employee liability provision is "to penalize the wrongdoing employer"). At the same time, because the remedy is a form of back pay, at other points in the legislative history the required monetary payments are referred to as "damages." 134 CONG. REC. S8375 (daily ed. June 22, 1988) (remarks of Sen. Kennedy); 134 CONG. REC. H5512 (daily ed. July 13, 1988) (remarks of Rep. Gaydos).

Whatever the locution, the basic point is that a purpose of the back pay remedy provision is to further the statutory aim of securing proper notice in the same way as the separate payments-to-government-officials-for-failure-to-provide-notice provision, explicitly labeled a "civil penalty" in the Act, 29 U.S.C. § 2104(a)(3). *See* H.R. CONF. REP., *supra*, at 1052-53 (characterizing the two forms of monetary liability provided for in the Act as "[d]amage payments to employees" and "damage payments to local governments").

That being so, Congress crafted the monetary-payment-to-employees provision to provide a simplified form of recompense for the affected employees' lost opportunity to respond to the notice by participating in effective retraining and reemployment programs or by seeking to reverse the plant closing decisions. The result is a provision for monetary payments in the event of a statutory violation which are easily calculated largely without painstaking inquiries into each individual employee's circumstances.

Additionally—since the impact of the violation on the employees and the deterrent effect on employers is the same in both situations—Congress also provided that the form of relief should be the same where the employees have a union representative as where they do not. Given the legislative determination not to provide an injunctive remedy or a legal damages remedy, the choice Congress

made in this regard was all but foreordained. Providing no statutory remedy where the notice is to the union would obviously make the statute a dead letter in that class of situations. And, providing monetary relief payable to the union itself where the union sues, but monetary relief to unrepresented employees where there is no union or where the employee sues, would appear to provide a windfall to the union. At least equally to the point, providing monetary relief payable to the affected employees where the union sues for a violation (as well as where unrepresented employees sue) suitably redresses the injury to the union by reason of the violation since the notice right was created to facilitate the union's role in providing "mutual aid and assistance" (NLRA § 7, 29 U.S.C. § 157) to represented employees in a plant closing or mass layoff situation.

(4) *Litigating Authority*: After specifying how "*such liability*"—plainly referring to the very monetary liability just described—shall be calculated (29 U.S.C. § 2104 (a)(1)), the WARN Act then goes on to provide that "*such liability*" can be enforced in court by, *inter alia*, "a representative of employees . . . aggrieved under paragraph (1)," as well as by the employees themselves.

This concurrent permission to the statutory representative and employees to bring suit—which was in both the House and Senate bills as introduced (134 CONG. REC. S538 (daily ed. Feb. 19, 1987) (§ 205(a)(3) as introduced); 134 CONG. REC. H1122 (daily ed. Feb. 18, 1987) (§ 355(a)(2) as introduced)), and which drew no elucidating comment during the ensuing legislative process—precisely parallels the rule that applies under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. That comes as no surprise, since the overall structure of the WARN Act closely parallels that of LMRA § 301 with regard to the role of the union as exclusive representative.

LMRA § 301(b) provides quite generally that "Any such labor organization may sue or be sued as an entity *and in behalf of the employees whom it represents* in the

courts of the United States." 29 U.S.C. § 185(b) (emphasis supplied). In *International Union UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 699-700 (1966), this Court held that a union which—as an exclusive representative pursuant to the same NLRA provisions incorporated in the definition of "representative" in the WARN Act—negotiates a collective bargaining agreement may bring suit "to recover wages or vacation pay claimed by its members pursuant to [the] . . . contract." 383 U.S. at 699. At the same time, as *Hoosier Cardinal* expressly recognized, under the rule of *Smith v. Evening News Assn.*, 371 U.S. 195 (1962), individual employees may sue for the same individual monetary relief (unless precluded by grievance-arbitration provisions of the agreement itself, *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965)). Thus, the LMRA § 301

> [c]ase law . . . sets this guiding principle: when a claim derives from a collective bargaining agreement . . . the labor organization is *an* appropriate party (although not the *only* appropriate party) to vindicate employees' rights. . . An employee's 'personal rights' may be vindicated *either* by the union *or* by the employee herself. [*Office and Professional Employees Int'l Union, Local 2 v. F.D.I.C.*, 962 F.2d 63, 66 & n.6 (D.C. Cir. 1992) (R. Ginsburg, J.).]

See also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562 (1976).

The WARN Act, as we have seen, extends the authority of unions as exclusive representatives beyond enforcing collective bargaining agreements to enforcing WARN Act notice rights. Like the National Labor Relations Act and the Railway Labor Act, the WARN Act provides that as to certain matters—there, negotiating collective agreements, here, providing notice of plant closings—employers have a legal duty that flows to the union in its representative capacity and to the union *alone*. In both instances, because of its exclusive role vis-a-vis the employer, the union is in a decidedly better position than the employees individually to protect the employees' interests where the employer breaches its legal duties.

For example, a union representative which has negotiated a collecive bargaining agreement may be aware of bargaining table interchanges that throw light on ambiguous terms of the agreement and indicate that the employees' rights are in fact being violated. Under the WARN Act, even more obviously, since only the union is entitled to statutory notice, only the union will be aware when notice is not supplied. Additionally, the key provisions of the WARN Act governing whether or not notice is due turn upon the impact of an employer decision on employees as a group. The union in its capacity as exclusive representative will normally be able to gauge that impact; any individual employee would find it difficult to do so. *See, e.g.*, 29 U.S.C. § 2101(a)(2) (notice required in the event of a plant closing only "if the shutdown results in an employment loss . . . during any 30-day period of 50 or more employees"); 29 U.S.C. § 2101 (a)(3) (notice required in the event of a mass layoff only if there is an employment loss during any 30-day period of either 33 percent of the employees and at least fifty employees or a total of 500 employees).

Finally, just as many cases brought on a collective bargaining agreement will involve common issues of contract interpretation affecting the employees as a group, it is also the case under the WARN Act that almost all of the substantial legal issues likely to arise in litigation—for example, whether the plant closing or mass layoff was "caused by circumstances not reasonably foreseeable at the time that notice would have been required" or whether "the employer reasonably believed in good faith that giving the notice required would have precluded the employer from obtaining . . . needed capital or business" (29 U.S.C. §§ 2102(b) & (e))—will be common to the affected employees as a group.

For all these reasons, Congress concluded that in the WARN Act, as in LMRA § 301, it would be "artificial and pointless to cut off [the union's] representative functions at the courthouse door." *United Federation of*

Postal Clerks v. Watson, 409 F.2d 462, 470 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1969) (citing *Hoosier Cardinal*).

In sum, the WARN Act provision authorizing unions as statutory representatives to bring suit in the event of a failure by the employer to provide the requisite statutory notice and to recover the monetary redress to aggrieved employees provided for on such a violation is well-adapted to the statutory scheme as a whole. The means by which "representatives" are chosen is governed by statute (the National Labor Relations Act and Railway Labor Act, incorporated by reference), and supervised by one of two governmental agencies (the National Labor Relations Board and National Mediation Board) and the representative once chosen is subject to a duty of fair representation. The union representatives that may sue to recover monetary payments for represented employees also represent those same employees for purposes both of determining their terms and conditions of employment and of enforcing those contractual rights through grievance/arbitration procedures and in court. The statutory liability questions are likely to be common to the represented employees as a whole, while the monetary sum payable to aggrieved employees is set through a purposely simplified calculation, rarely involving factual determinations individual to a single employee.

(C) With this understanding of the interrelated determinations Congress made in structuring the substantive and enforcement provisions of the WARN Act, we return to the three-fold inquiry into the standing question applicable in federal statutory cases we outlined at pp. 13-16, *supra*.

First, it could not be clearer that Congress specifically authorized unions acting as exclusive representatives to bring suit against employer violators of the WARN Act's notice requirements and to seek the redress provided by the Act in the form of monetary payments to the affected employees the union represents.

Second, because of this statutory grant of authority to litigate, the only pertinent standing limitations are those derived directly from Article III.

Third, the bedrock Article III requirement is that the litigant "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).[7] In this case, a focus on the statutory scheme alone is sufficient to determine that each aspect of the Article III standing minima is present in this case.

(1) Under the statute, Brown Shoe was obligated to provide notice to Local 751, at a certain time under certain circumstances. According to the complaint, Brown Shoe did not do so. By failing to fulfill a specific legal duty owed to the specific plaintiff, and to the plaintiff alone, Brown Shoe caused Local 751 a legal injury of the most traditional kind, albeit one that exists by virtue of the statute itself rather than the common law. And, the resultant legal dispute as crystallized in this lawsuit will certainly be presented in a factually discrete circumstance with defined consequences, rather than "in the rarified atmosphere of a debating society," *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982): The primary questions to be determined, aside from those of statutory interpretation, concern matters grounded in a specific time and place concerning a specific decision to close a specific plant and the specific manner in which the closure was accomplished. As the party which should have received proper notice but assertedly did not, it is the union as the

[7] As we develop later, the oft-repeated statement that to support Article III standing the injury must be to the plaintiff *herself* does not pretend to completeness. The federal judicial power has always reached a large variety of cases in which the litigant is not the injured person herself but a person regarded as legally identical to the injured person for purposes of the lawsuit in question.

affected employees' representative, and not the employees acting independently of the union, that is in the best position to present such a case to the court with the requisite "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The instant case, in other words, is at the other end of the spectrum from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the *only* case in which this Court has invalidated a Congressional grant to a plaintiff of standing to sue as contrary to the Article III standing criteria. In *Lujan*, because the statute permitted *any citizen* to sue, "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the . . . laws" (*id.* at 573), the Court determined that the statute exceeded the "outer limit to the power of Congress to confer rights of action," (*id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Further, the statute in question in *Lujan* did not in terms create any legal duty owing to any specific citizen but only created a right in all citizens to sue. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).[8] And, third, as the *Lujan* Court emphasized, reading Article III as permitting Congress to authorize the citizenry at large to sue over *government decisions* would undermine the constitutionally mandated separation of the Legislative Branch from the Executive Branch which is maintained, in part, through Article III's limitation of the judicial power to "cases or controversies." *Id.* at 577 ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right'

[8] The concurring opinion in *Lujan* was careful to note that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before" and did not "read the Court's opinion to suggest a contrary view." *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed. Art. II, § 3."); *see also id.* at 580 (suggesting that even the "outer limits" on congressional authority to create causes of action may only apply in "suits against the government").

In contrast, as we have stressed, the WARN Act creates a specific legal duty running from the employer-defendant in particular to the union-plaintiff in particular. And, in a statute governing the relationship between two private parties, Congressional determinations concerning the enforcement of statutory obligations raise none of the concerns that animated *Lujan* regarding the legislative usurpation of executive authority through expansion of the judicial role to determine public disputes.

(2) It is also ascertainable, from the statute itself and from the allegations of a statutory violation contained in the complaint, that it was the defendant, Brown Shoe, that directly "caused" the plaintiff, Local 751, legal injury. It was Brown Shoe that had a statutory duty to provide the notice, Local 751 that had a right to receive notice, and the complaint alleges that Brown Shoe did not provide notice.

(3) The remaining question, then, is posed by the "redressibility" aspect of this Court's constitutional standing jurisprudence. That question arises by reason of the fact that the monetary payments the WARN Act authorizes as the sole remedy for the violation alleged and that the union seeks will not ultimately go to the union treasury but to the employees whose interests the notice right serves to protect and that the union is charged with advancing.

The standing cases turning on the redressibility issue have involved a narrow range of strikingly similar situations. In each, plaintiffs—acting without any specific Congressional authority—have sought injunctive relief against governmental enforcement actions pertaining to third parties. And, these plaintiffs have sought to justify their lawsuit by contending that the third parties might behave differently in a manner benefitting the plaintiffs if the government changed its enforcement program. *Allen v. Wright, supra; Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976); *Linda R.S. v. Richard D., supra.* As the last of these cases makes explicit, the denial of standing on the basis that the relief requested might not redress the plaintiff's injury was generated by the same consideration that was decisive in *Lujan*—that judicial decision of suits of this kind would be a usurpation by the judiciary of governmental decision-making entrusted to the legislature and the executive. *Allen v. Wright, supra,* 468 U.S. at 761 ("the idea of separation of powers . . . counsels against recognizing standing in a case brought, not to enforce specific legal obligations . . . but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.")

Further, while redressibility is part of the Article III standing jurisprudence, it is worthy of note that this Court has *never* overridden an explicit statutory or traditional common law cause of action on the basis that the statute does not provide appropriate redress to A for the legal injury to A's interests underlying the case of action. In large part, we submit, that legal result follows from the inherent complexity of remedial issues and the resulting breadth of the constitutional authority of legislatures and common law courts to create remedial schemes to vindicate legal rights and to correct legal injuries.

The choice of a form of relief to "redress" a particular injury depends upon practical considerations very much the province of legislatures and common law courts. In one sense, for example, a damages award never "redresses" a plaintiff's injury directly. Compensatory damages do not

restore a severed leg or reverse the pain caused by the injury. Nor does such an award necessarily induce the particular wrongdoer who caused the injury to fulfill his duty of care toward the plaintiff, either retrospectively or in the future. Thus the form and nature of monetary remedies for a wrong is the product of a societal judgment on how to further a set of interests which include those of the plaintiff and those of society at large in deterring similar conduct in the future. How those interests are to be furthered depends on the nature and the purpose of the particular right and on the overall legal scheme of which that right is but one part.

That being so, the law has never limited monetary remedies for the defendant's failure to perform a legal duty due to the plaintiff to remedies that flow to the plaintiff herself, and not to other individuals in whose well-being the plaintiff has a legally-recognized interest. Rather, courts and legislatures have appreciated that where a duty owed to one person is intended at least in part to aid that person in forwarding another individual's (or individuals') welfare, the failure of a defendant to perform the duty owed is best vindicated by judicial relief that flows to the beneficiary rather than to the holder of the legal right.

The most obvious of these circumstances, and the most venerable, is the enforcement of third-party beneficiary contracts, in which A agrees with B to provide some benefit to C. As the holder of the legal right, B has always been understood to have a cause of action to enforce the agreement:

> The promisee of a promise for the benefit of a beneficiary has the same right to performance as any other promisee . . . If the promisee has no economic interest in the performance, as in many cases involving gift promises, the ordinary remedy of damages for breach of contract is an inadequate remedy. . . . In such cases specific performance is commonly available. . . . [Restatement (Second) of Contracts § 305 (1979).]

See also id. at § 307, Comment a; 4 *Corbin on Contracts* § 812 at 243-44 (1951) (promisee can sometimes sue as an imputed trustee to recover monetary damages on behalf of the third party beneficiary). The debated question, indeed, has not been whether the promisee can sue to require the promisor to pay the third party beneficiary but whether or not C, the beneficiary, can sue. *See generally* 4 Corbin § 772 (difficulties surrounding enforcement of third party rights); Restatement (Second) of Contracts §§ 304, 309, 310 (rights of a third party beneficiary); Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109 (1985).

The third party beneficiary cases are sufficient to demonstrate that cases in the form of the instant case have been "historically viewed as capable of resolution through the judicial process." *Flast supra*, 392 U.S. at 95. For those cases show that B's demonstrated interest in the welfare of C when conjoined with B's interest in vindicating her own legal rights provide the necessary assurance that the "questions [will be] presented in an adversary context." *Id.*, at 95.

There is, moreover, a second set of long recognized judicial cases similar in structure to this case—and to the third party beneficiary cases—created by the federal statutes in which government entities are granted litigating authority to sue one private party for violation of statutory obligations owed to another private party (or group of parties) and to obtain relief which at least in part provides individualized monetary payments to the latter. For example, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), the Equal Employment Opportunity Commission may sue for "specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimi-

nation victims." *General Telephone Co. of the Northwest v. EEOC supra*, 446 U.S. at 326. *See also, e.g., Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (Secretary of Labor permitted, as statute provides, to pursue claims for monetary relief for individuals for violation of the Fair Labor Standards Act); ERISA, 29 U.S.C. § 1132(a)(2) (granting the Secretary of Labor the power to sue for violation of ERISA). The governmental entity in such cases "is not merely a proxy for the victims of discrimination, and the EEOC's enforcement suits should not be considered representative actions." *General Telephone, supra*, 446 U.S. at 326. Rather, the EEOC—and agencies bringing similar cases pursuant to statutory provisions—are acting "to vindicate the public interest." *Id.; see also Riddle v. Cerro Wire & Cable Group*, 902 F.2d 918, 921-22 (11th Cir. 1990) (suit brought by EEOC is not necessarily res judicata as to interests of the individual discriminatees, because EEOC and individual do not share the same interests in the litigation.)

At the same time—and, as is true in the third party beneficiary cases—the EEOC, the Secretary of Labor, or other government entity acts to vindicate a right whose very purpose is to forward the rights and interests of the specific individuals the defendant has injured in a specific way through the defendant's specific violations alleged in the complaint. That being so, in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co., supra*, 115 S. Ct. at 1286, this Court recognized that remedial schemes of this kind, in which a plaintiff government entity pursues its own legal interest in court and in the course of so doing generates individualized judicial monetary relief that flows to such specifically injured third parties, are consistent with Article III standing principles.

There is, of course, yet a third apt analogy. As we have noted, the closest analogue to the WARN Act statu-

tory scheme—and to the role of the union representative in that scheme—is the LMRA § 301's litgiation authorization to unions that are parties to collective bargaining agreements to sue for monetary relief for lost wages and benefits for represented employees recognized in *Hoosier Cardinal*. See pp. 24-27, *supra*.

It is true, of course, that here the union's right is statutory rather than contractual. But the distinction between a defendant's violation of self-created norms and a defendant's violation of Congressionally-created norms is of no moment to standing analysis. In both instances the union *itself* has suffered a legal injury in its role as exclusive representative—there, by reason of an employer's failure to abide by the collective bargaining agreement's terms, here by reason of the employer's failure to give notice due to the union as the employee's representative. There is nothing of pertinence that suggests that it is more appropriate in one instance than in the other to permit a union that has in fact suffered a cognizable legal injury to vindicate its legal right and to do so through a remedy that forwards the employment-related interests of the represented employees.

The upshot of this analysis is that where there is a common law or statutory legal duty owed to the plaintiff which will, if carried out, enable the plaintiff to act on its legally recognized interest in furthering a third party's welfare, and where that duty has been breached, an otherwise appropriate plaintiff can pursue relief, monetary, individualized, or otherwise, which redounds to the financial benefit of the third party. Put another way, in such situations, given the precise nature of the plaintiff's legal right and of the concrete legal duty owed by the defendant to the plaintiff, and the consequent legal injury caused by the defendant's violation, monetary relief for the benefit of third parties *will* redress the plaintiff's legal injury. The plaintiff thus has Article III standing to bring and prosecute the lawsuit.

II. The Plaintiff Union Has Article III Standing To Bring This WARN Act Suit For The Employer's Failure To Provide A Plant Closing Notice By Reason Of Its Statutory Designation As The Representative Of The Adversely Affected Employees For This Purpose.

The Eighth Circuit entirely ignored the point that forms the basis for the standing argument we have just developed—that the plaintiff union is the holder of the legal right the defendant employer is alleged to have violated here—and instead treated this case as if the affected employees were the rightholders and as if the union were bringing this suit as a voluntary membership association. And, on that view, the Eighth Circuit took it that the union did not have standing because the union had not *itself* suffered a concrete legal injury, and because Article III requires that a federal court plaintiff suffer such an injury.

A. The Eighth Circuit's understanding of Article III is wrong in its own terms. In fact, in a

> variety of circumstances, both traditional and modern, a party is permitted to appear in court as a formal representative of other interests. Trustees, guardians and personal representatives are familiar examples. [Wright, Miller & Cooper, 13 *Federal Practice & Procedure* § 3531.9 at 627 (West 1984).]

See also Matter of Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1319 (7th Cir. 1992) ("representative damages litigation is common—from class actions under Fed. R. Civ. P. 23(b)(3) to suits by trustees representing hundreds of creditors in bankruptcy to *parens patriae* actions by state governments to litigation by and against executors of decedents' estates.")[9]

[9] A small sampling of such cases in this Court includes: *Reiter v. Cooper*, 507 U.S. 258 (1993) (bankruptcy trustee); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (executor); *United States v. Clark*, 445 U.S. 23 (1980) (guardian on behalf of children); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980) (trustee);

We recognize, of course, that the Eighth Circuit relied on Article III standing cases—none of which involved a representative designated by statute or recognized at the common law—that summarize the "injury in fact" requirement through some form of the phrase "*personal* stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. at 186 (emphasis supplied).[10] But, from the first, this

Robertson v. Wegmann, 436 U.S. 584 (1978) (executor); *Van Dusen v. Barrack*, 376 U.S. 612, 614 (1964) (personal representatives in wrongful death action) *Hanson v. Denckla*, 357 U.S. 235 (1958) (executor); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 310 (1950) (guardian of trust); *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.*, 333 U.S. 821 (1948) (administrator in FELA wrongful death action, 45 U.S.C. § 51); *Bullard v. City of Cisco, Texas*, 290 U.S. 179 (1933) (trustee); *Mecom v. Fitzimmons Drilling Co.*, 284 U.S. 183 (1931) (administrator); *Pendleton v. Benner Line*, 246 U.S. 353 (1918) (bailee); *Mexican Central Railway Co. v. Eckman*, 187 U.S. 429 (1903) (guardian); *The Beaconsfield*, 158 U.S. 303 (1895) (bailee); *Dodge v. Tulleys*, 144 U.S. 451 456 (1892) (trustee; "whether one or many [beneficiaries], the trustee represents them all, and in his name the litigation is generally and properly carried on."); *The Mamie*, 105 U.S. (15 Otto) 773 (1881) (personal representative); *Dennick v. Ry. Company*, 103 U.S. (13 Otto) 11, 19-21 (1880) (capacity of administrator in wrongful death action determined by state law); *The Thames*, 81 U.S. (14 Wall.) 98 (1871) (in admiralty agent may sue to recover for damage to absent principal's cargo); *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306, 308 (1808) (trustee); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (administrators of estate). *See also* 28 U.S.C. §§ 754, 959 (authorizing appointment of receivers); 45 U.S.C. § 51 and 46 U.S.C. §§ 688, 761 (authorizing wrongful death action by personal representative, for benefit of specified heirs).

These familiar examples are far from exhausting the list. *See, e.g., In re Oil Spill by the Amoco Cadiz, supra*, 954 F.2d at 1319-20 (7th Cir. 1992) (French trade syndicates may sue in federal court for damages on behalf of their members, where authorized to do so by law of France); *The Bello Corrunes*, 19 U.S. (6 Wheat.) 152 (1921) (foreign consul may represent citizens of that country in U.S. litigation).

[10] *See, e.g., Valley Forge Chistian College v. Americans United for Separation of Church & State, supra*, 454 U.S. at 758, *quoting*

Court's more complete articulation of the applicable principle has recognized a role for properly designated representatives:

> *Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another,* he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury to himself, as distinguished from the great body of his fellow citizens [*Tyler v. Judges of the Court of Registration,* 179 U.S. 405, 406 (1900), emphasis supplied.] [11]

Gladstone Realtors v. Village of Bellwood, supra, 441 U.S. at 99 (plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"); *Lujan v. Defenders of Wildlife, supra,* 504 U.S. at 573, *quoting Sierra Club v. Morton, supra,* 405 U.S. at 734-35 ("the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."); *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 38 (standing question is "whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."); *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 395-97 (1980).

[11] Even where the purported representative has "no particular entitlement to stand in the shoes of the represented party" (*Matter of Oil Spill by the Amoco Cadiz, supra,* 954 F.2d at 1319), there are situations in which this Court has permitted representational litigation. One of those situations is defined and delimited in the associational standing doctrine. *See* pp. 43-46 *infra.* Another is the common law "next friend" doctrine, by which an individual not authorized by any legislative or judicial act steps forward to litigate on behalf of a third party who has not expressly authorized the representation. This Court *has* recognized that such individuals *without* a direct stake in the outcome of a case can, consistent with Article III, bring suit if there are strong practical reasons to allow them to do so (the inability of the affected individual to represent herself) and some assurance that the "next friend" will advance the best interests of the party being represented (true dedication to the best interests of the represented person and a pre-

B. This long and ancient authorized-representative-plaintiff line of cases is entirely consistent with Article III standing jurisprudence. The standing inquiry at bottom, as we noted at the outset, rests on the lessons drawn from the classes of cases that have "a form historically viewed as capable of resolution through the judicial process." *Flast, supra,* 392 U.S. at 95.

That being so, the inquiry must begin from the actual historical practice—which, as characterized by the *Tyler* case nearly one hundred years ago, has been and remains that "the plaintiff is permitted to sue for the benefit of another" if authorized "by statute or the settled practice of the courts." The continuing vitality of this understanding is perhaps best illustrated by Fed. R. Civ. P. 17, which expressly provides that "[a]n executor, administrator, guardian, bailee, trustee of an express trust . . . or *a party authorized by statute* may sue in that person's own name without joining the party for whose benefit the action is brought . . ." (emphasis added).

Equally to the point, in such instances the lesson of history is that the case *is* presented in a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College, supra,* 454 U.S. at 472.[12] The circumstances of the

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existing, generally familial, relationship). *Compare, Whitmore v. Arkansas,* 495 U.S. 149 (1990) (plaintiff not entitled to act as "next friend" where prisoner was competent to represent himself, and putative "next friend" had no prior relationship to prisoner) *with Bradley v. Harrelson,* 151 F.R.D. 422 (M.D. Ala. 1993) (father could represent his mentally disabled son as a "next friend" plaintiff).

[12] As noted previously, cases such as this one (and the vast majority of authorized representative situations) do not implicate the other major theme of contemporary standing law, the "relationship[] between the coequal arms of the National Government." *Valley Forge Christian College supra,* 454 U.S. at 483.

represented individual supply that necessary detail and realism, so that "a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id.* Thus, once it has been determined as a question of nonconstitutional common or statutory law that A is a properly authorized representative of B, the federal courts have regarded A's interests as identical with B's. And, the constitutional standing inquiry then focuses upon whether the *represented* individual—or real party in interest—has suffered the requisite injury in fact to meet the standing concern with "concrete adverseness". *Baker v. Carr, supra,* 369 U.S. at 204. *Compare McClure v. Carter,* 513 F. Supp. 265 (D. Idaho), *aff'd per curiam,* 454 U.S. 1025 (1981) (Congress' authorization of Senator to bring suit to challenge appointment of judge did not create standing where the Senator himself had no concrete interest and was not the designated representative of anyone who had such an interest).[13]

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[13] Courts have, indeed, generally recognized that where one individual purports to be the properly designated representative for litigation purposes of another individual or individuals, only the situation of the represented individuals need be considered in determining the requisite factual concreteness issue in the standing analysis; the question whether the particular representative is properly authorized is regarded as the separate question of capacity. *Firestone v. Galbreath,* 976 F.2d 279, 283 (6th Cir. 1992) ("Frequently, attorneys and courts confuse the concepts of standing with that of capacity to sue and with the real party in interest principle. . . . According to the Complaint, the Estate could trace a direct injury to the alleged acts of the defendants. The question is whether these plaintiffs can sue on behalf of the Estate. This would seem to be a question of capacity rather than standing . . . ."); *Glickstein v. Sun Bank/Miami, N.A.,* 922 F.2d 666, 670 (11th Cir. 1991) ("The question in this case is whether Howard Glickstein is able to bring this case on behalf of the estate. This is not a question of standing; rather, this issue involves the question of whether Glickstein has the capacity to bring this action on behalf of the estate.")

The form and nature of authorized representative litigation also serves to satisfy the two remaining concerns of the standing law—preserving the autonomy of affected persons (*Valley Forge Christian College, supra,* 454 U.S. at 473), and promoting the adversarial presentation of the dispute (*Flast, supra,* 392 U.S. at 97).

The putative representative is not just any mere "concerned bystander[]." *United States v. SCRAP,* 412 U.S. 669, 687 (1973). He or she either has been directly selected as a suitable representative by some official process, or meets officially-promulgated criteria, or has been appointed by the putative beneficiary himself or herself. *See* 18 Wright, Miller & Cooper, Federal Practice & Procedure, Jurisdiction § 4454, at p. 460 (1981) ("[a] mere self-appointed volunteer cannot usurp authority to bind anyone else by litigation. Representative capacity must be established instead by private or public appointment.")

Further, in these instances the representative typically has some concomitant legal *duty* to forward the interests of the party being represented, imposed by statute, contract, or common law. *See, e.g.,* Restatement (Second) of Trusts, § 174 (trustee has duty to use "such care and skill as a man of ordinary prudence would exercise in dealing with his own property"), § 177 (enforcement of actions), § 178 (defense of actions), § 192 (compromise of claims).[14]

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[14] *Hodel v. Irving,* 481 U.S. 704 (1987) well illustrates how ingrained is the judicial understanding that litigation through properly authorized representatives does not create Article III standings problems of any substance, while representational litigation by individuals who are *self-appointed* to protect the interests of others does require close Article III analysis. In *Hodel,* the Court, without comment, permitted plaintiffs to "represent" heirs or devisees of Indian decedents. 481 U.S. at 709-710 (emphasis supplied) (plaintiffs "are or represent" heirs or devisees; "[b]ut for [the contested statute] this property would have passed . . . to appellees or *those they represent.*") The Court then went on to discuss at length, although the question was not contested,

C. For reasons already largely canvassed, this case falls squarely within this traditional category of authorized representative cases. *See* pp. 36-41, *supra*. Here, "the union is no mere volunteer whose representation of others must be checked for adequacy. . . . The union has already been certified by a neutral government agency as the 'exclusive representative' of the bargaining unit employees." *Local 2 v. FDIC*, *supra*, 962 F.2d at 67 (citation omitted). And, as we have noted, the union in carrying out its representational functions is bound by "the duty of fair representation . . . akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots Ass'n v. O'Neil*, *supra*, 499 U.S. at 74. Based on this authorization and the relationship created thereby, Congress in the WARN Act made its determination to specifically authorize the union, as exclusive representative, to bring this kind of suit.

In sum, even on the Eighth Circuit's view of this case as one fundamentally concerning the rights of the employees individually to monetary relief rather than as one involving an obligation owed to the employees' representative, the case still involves a traditional "case or controversy" and a traditional adversary relationship, so that the employees being represented would have had Article III standing to sue. And, as the court below itself recognized, the union is authorized by the WARN Act to act in a representative capacity on behalf of the employees. That

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whether or not the plaintiffs could rely on the constitutional interests of the decedents in litigating their case. 481 U.S. at 711 *et seq.* That perceived standing problem arose because the usual common law solution to litigating on behalf of a deceased person, official appointment of an executor, was not available in the particular circumstances (since the decedent was an Indian, as to whom the Secretary of the Interior ordinarily pursues surviving claims). It was a group of individuals' self-appointment without any official authority to forward the decedents' rights that required extended consideration, although those individuals were held to have standing in the end. 481 U.S. at 711-12.

being so, the union has Article III standing to bring this case.

D. Ignoring all of the relevant law regarding authorized representatives, however, the Eighth Circuit analyzed this case as one that fits the set of cases in this Court dealt with whether, and under what circumstances, associations with *no* statutory or common law authority to do so may litigate on behalf of their members. The Eighth Circuit thereby confused a subset of representational litigation for the whole.

The associational standing cases such as *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) and *International Union, UAW v. Brock*, 477 U.S. 274, 281 (1986) on which the court below relied cover only one small part of the representational standing law.[15] In the *Hunt* class of cases, there are *no* established standards or procedures, common law or statutory, for designating the plaintiff association as the representative of the association's members for purposes of litigation, nor any assurance of adequate associational representation other than whatever such assurances are provided by the association's internal governing documents. Consequently, the question addressed by the associational standing cases is whether such authority to litigate on behalf of others should be *implied* from the voluntary relationship between the association and its members, and if so under what circumstances.[16]

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[15] While *UAW v. Brock* involved representation by a union, the statute under which suit was brought did not address the question whether the union was authorized to bring suit.

[16] As noted (n.11, *supra*), the "next friend" cases raise a similar problem of devising limitations on volunteer representation of a third party's interests. The difference is that in the "next friend" situation the Court had a body of common law precedents to draw upon, while in the associational situation there were no such precedents and the Court was required to proceed on its own in developing criteria over time.

Hunt crystalizes the associational standing inquiry through a three-part judicially-created standard to fill the resulting void:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. [432 U.S. at 343.]

The Eighth Circuit's conclusion that the union here lacks standing, rested on the third prong of the *Hunt* standard. Because individual monetary damages were being sought, the court below concluded, "the relief requested requires the participation of individual members in the lawsuit." *Hunt,* 432 U.S. at 343, cited at Pet. App. 9a.[17]

The first *Hunt* requirement—which assures that there is the requisite concrete injury to the beneficiary, so that the case is one in which the judicial power can be exercised with sufficient focus and specificity—is, to be sure, part of the constitutional standing inquiry, and applies, as we have seen, in all representational cases. See pp. 39-40, *supra.* The second two associational standing criteria, however, have no independent role where "by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another." *Tyler v. Judges of the Court of Registration, supra,* 179 U.S. at 406.

The second "germaneness" prong ascertains whether it is appropriate to regard the organization as a surrogate

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[17] Although there is no need to address the question, it is our position that, given the simplified nature of the monetary relief here provided, this third *Hunt* prong is in any event met here. *See* pp. 19-23, *supra.*

for the injured individual in forwarding the individual's interests, by probing the identity of interest between the association and its members. Where this question is addressed instead by the common law or by statutory criteria regarding the appointment of an authorized representative, there is nothing in the Constitution that suggests—much less requires—that the federal courts are to make a second independent determination. Here, for example, the statutory materials determine how the representative is chosen (through a free and fair majority determination of all affected employees), and specify the scope of the representative's authority (collective bargaining and related matters under the NLRA and RLA, as well as protecting employees' interests under WARN.) There is simply no legal void for the *Hunt* "germaneness" determination to fill.

The third "individual participation" requirement is essentially one relating to efficient judicial management of a volunteer associational suit. In the *absence* of Congressional or other authorization of the representative, this Court has sought to take account of the represented party's autonomy interest and of the adversariness interest by asking whether a given *self-appointed* associational representative is sufficiently responsive to the interests of individual members, and whether the interests of the individuals in the group are diverse or conflicting. Where there has been a statutory or a common law authorization, however, not only have such concerns been addressed, but there is typically, as here, a concomitant assurance of fair representation not present in the pure associational cases.

In short, only the first *Hunt* prong is a constitutional, Article III requirement, applicable in every form of representational case. And, there is no dispute that this *Hunt* requirement is satisfied here. The other two aspects of the *Hunt* litany are applicable only where the association in question has "no particular entitlement to stand in the shoes of [its] members" (*Matter of Oil Spill by the*

Amoco Cadiz, supra, 954 F.2d at 1319), and is relying instead on a voluntary relationship with its members to supply that authority. That is not the situation here. And, those aspects of *Hunt* have no application where the suit is brought by a representative designated by a federal statute.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed and the case should be remanded for determination of the merits.

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OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751,
Petitioner,

v.

BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether a labor union has standing under Article III of the Constitution to maintain a federal lawsuit for monetary damages on behalf of its individual members pursuant to the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§2101-09.

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Tushnet, The "Case" or "Controversy" Controversy, 93 Harv. L. Rev. 1698 (1980) 31

Wright & Miller, Federal Practice & Procedure 43

No. 95-340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751,
Petitioner,

v.

BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of Article III of the United States Constitution and of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§2101-09, are reproduced in the Addendum to this brief, *post* at pp. A-1 *et seq.*

STATEMENT OF THE CASE

On January 17, 1992, Respondent Brown Group, Inc., d/b/a Brown Shoe Company ("respondent" or "Brown"), sent a notice to William L. Treece, Assistant Director for Footwear, Food and Manufacturing of the United Food and Commercial Workers

International Union, advising that Brown's Dixon, Missouri, shoe manufacturing plant would be permanently closed beginning on March 20, 1992 (JA 62-63).[1] The notice was furnished pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§2101-09 ("WARN"). The addressee, Treece, was the official who had signed the collective bargaining agreement with Brown on behalf of the international union (JA 61).

On June 16, 1992, Petitioner United Food and Commercial Workers Union Local 751 ("petitioner" or "the Union") filed suit against Brown in the United States District Court for the Eastern District of Missouri under WARN, alleging that the January 17th notice failed to give sufficient or appropriate notice of respondent's intention to close its Dixon plant (JA 7).

The ten-paragraph complaint asserted that the notice was not in compliance with WARN because Treece was "not the exclusive representative of the affected employees" (JA 9 ¶7), while elsewhere petitioner referred to January 17, 1992, as "the date on which [respondent] provided [petitioner] written notice of the permanent closing of the Dixon plant pursuant to §2102(a) of the WARN Act" (JA 8 ¶6).

The suit identified petitioner as the "employee representative" for 277 union members employed at the plant "on whose behalf the relief prayed for herein is sought" (JA 8 ¶5). The Union asserted that Brown began laying off plant workers on January 31, 1992, and continued the layoffs during February and March, and that those persons were "aggrieved employees under the WARN Act entitled to relief as set forth in §2104 of the Act" (JA 9 ¶¶8, 9). Attached to the complaint was a copy of the union contract (JA 11-61) and a chart listing the names and the last day of work for the 277 employees (JA 64-73).

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[1] Brown Group, Inc., is a publicly traded corporation that has no parents and no subsidiaries that are not wholly-owned.

The prayer of the complaint requested that Brown be required to "pay each of the aggrieved employees backpay and fringe benefits, including but not limited to, vacation pay, medical expenses, and contributions to the pension plan, for 60 days or for each day of each employee's employment loss . . . ." (JA 9-10 ¶10). The Union sought no relief for itself but did request costs, including reasonable attorneys' fees, and added a boilerplate prayer for "such other and further relief on its behalf and that of the aggrieved employees as may be proper" (JA 10).

Brown filed a motion to dismiss pursuant to Rule 12, Fed. R. Civ. P., challenging the Union's standing to maintain this action (JA 74). On April 12, 1993, the district court (Judge Edward L. Filippine) granted the motion and dismissed the complaint, concluding that the court was without jurisdiction because the Union had "not alleged injury to itself" and lacked constitutional standing to bring a WARN Act claim for monetary damages on behalf of its members, none of whom had been joined as parties. 820 F. Supp. 1192.[2]

On appeal, the Eighth Circuit affirmed in a unanimous opinion authored by Judge Pasco M. Bowman for a three-judge panel. 50 F.3d 1426. The court held that the Union had failed to establish either direct or associational standing and that the district court therefore had properly dismissed the complaint for lack of jurisdiction. With respect to the Union's direct standing to assert its own rights, the Eighth Circuit determined that the relief requested by the Union would not redress the Union's supposed injury. *Id.* at 1430. It rejected the Union's argument that the

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[2] Following the dismissal of this case, 63 of those members filed their own complaint in the United States District Court for the Eastern District of Missouri against respondent, on behalf of themselves and similarly situated employees, alleging the same violation of the WARN Act that was asserted in this action. *Aaron v. Brown Group, Inc.*, No. 4:94CV000207 TIA (E.D. Mo.). The plaintiffs in *Aaron* have amended their complaint three times to add an additional 79 plaintiffs, all of whom were represented by the Union when they were employed at the Dixon plant.

"catch-all prayer for relief" would remedy the "injury" resulting from respondent's alleged failure to give notice to the Union. *Id.* Judge Bowman reasoned, "We do not think that the boilerplate remedies language . . ., broad and nonspecific as it is, comports with the constitutional requirement of redressability envisioned by the Supreme Court in *Allen* [*v. Wright*, 468 U.S. 737 (1984)] and its other cases on the subject." *Id.* The court also specifically rebuffed the Union's argument that the language of WARN granting a union a right to sue to enforce the Act "relieve[s] the union of its obligation to meet the constitutional requirements of standing." *Id.*

Although the Union's brief to the Eighth Circuit expressly disavowed any reliance on the concept of "associational standing," the Court of Appeals addressed the issue nonetheless, apparently because it had been pleaded by petitioner and discussed by the district court. The court held that the Union had failed to meet the third part of the test for associational standing set forth by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), namely, that "'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" 50 F.3d at 1431. The appellate court reasoned that the relief the Union requested — backpay and benefits for its members — would require individualized proof because of the varying times of termination of each employee as alleged in the complaint, as well as the fact that the employees "were paid on a piecework basis." *Id.*

The Union's petition for rehearing and suggestion for rehearing en banc were denied without recorded dissent (JA 6).[3]

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[3] The district court had denied petitioner's belated request to amend its complaint to add individual union members as plaintiffs (JA 76), and the Court of Appeals also affirmed that aspect of the judgment. 50 F.3d at 1432. The Petition for Certiorari did not challenge that portion of the ruling.

SUMMARY OF THE ARGUMENT

The WARN Act requires an employer to give 60 days' advance notice of a proposed plant closing or mass layoff. If the affected employees are represented by a union, the notice is to be sent to the union; the local unit of government must also be notified. Section 2104(a) authorizes lawsuits to enforce the obligation to provide an appropriate notice. Paragraph (1) of §2104(a) creates a cause of action belonging to, and authorizes back pay and certain lost benefits for, "each aggrieved employee who suffers an employment loss as a result of such closing or layoff." Paragraph (3) imposes a "civil penalty of not more than $500 for each day of such violation," payable to the local community where the plant is situated. Paragraph (5) provides venue for actions brought in federal court by persons "aggrieved under paragraph (1) or (3)" of §2104(a)

In this case, the Union filed suit "on behalf of" 277 union members at respondent's Dixon plant, who were otherwise identified as "the aggrieved Brown Shoe employees on whose behalf the relief prayed for herein is sought" (JA 8). The complaint requested back pay and benefits for the affected employees (all of whom had individual piece-work wage rates) and attorneys' fees. The Union did not assert that it had suffered any injury as a result of the allegedly defective notice; it did not seek any remedy for itself; nor did it indicate in its complaint how or if the relief prayed for would redress any injury the Union might have suffered.

The plain language of WARN does not support the maintenance of this action by the Union, which admittedly was not "aggrieved under paragraph (1) or (3)" of §2104(a). The legislative history of WARN reveals (a) that the thrust of the statute was to require notice for the benefit of affected employees and local communities, not unions; (b) that in the case of union workers, notice was to be given to the union *for the benefit of* the members as a convenience to the employer so that it would not

need to provide hundreds or thousands of personal notices; and (c) that, to the extent that the "representative" referred to in §2104(5) is the union, such a designation does not reflect a conscious conferral of authority to sue but is a mere vestige in a venue provision from earlier bills that would have given the union an independent right and allowed the union to recover a penalty for violation of that right.

The Union lacks standing because it has not pleaded — and cannot show — any "injury-in-fact." This Court's standing jurisprudence requires a plaintiff to demonstrate, *inter alia*, that one of its "legally-protected" interests has suffered an injury that is distinct, concrete, real and immediate, not abstract. *Warth v. Seldin*, 422 U.S. 490 (1975); *Allen v. Wright*, 468 U.S. 737 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Here, the furnishing of an allegedly defective notice did not cause constitutional "injury" to petitioner because the Union was a mere conduit of the notice to its members; it suffered nothing more than a "procedural injury" of the type held insufficient to support standing in *Lujan*. The Union's complaint did not contain the kind of specific allegations of interference with its ability to function or to carry on its business that are necessary for an organization to have standing to sue in its own right. Petitioner cannot bootstrap itself into Article III by claiming in its brief that a timely notice would have facilitated performance of its duties as collective bargaining representative because it did not plead any such "injury," and nothing in the language or history of WARN suggests that Congress designed the notice to serve those purposes anyway. Moreover, in its collective bargaining agreement with Brown, petitioner specifically recognized the right of the employer "to close a plant permanently" and waived any right to negotiate concerning a plant-closing decision or its effects.

Standing is also wanting because the remedy sought in the complaint — back pay and certain benefits for plant workers —

will not redress the alleged failure of the Union to receive an appropriate or timely notice. To "redress" the Union's procedural "injury" would require ordering the plant to remain open until 60 days after the furnishing of a proper notice, but Congress has specifically prohibited injunctive relief in §2104(b). Any suggestion that back pay to employees would redress the Union's putative "injury" is necessarily speculative and thus inadequate for Article III purposes. *Lujan*, 504 U.S. at 561; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). Hence, to entertain this case would violate the well-ingrained principle that Article III judicial power "exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth*, 422 U.S. at 499.

Petitioner contends that Congress may create rights in persons and empower them to sue for infringement of those rights. But the mere capacity to appear in court does not *per se* create standing, and Congress cannot abrogate the Article III minimum requirement that "a plaintiff must always have suffered 'a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted.'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). This Court, accordingly, has not hesitated to reject standing claims even when the plaintiffs have fallen squarely within the class authorized by Congress to sue. *E.g.*, *Lujan*, 504 U.S. at 576; *Sierra Club v. Morton*, 405 U.S. 727 (1972). For Congress to attempt to require the courts to hear a particular case that does not otherwise meet the injury and redressability requirements of Article III would violate the separation of powers.

Neither petitioner's status as exclusive bargaining agent for the affected employees nor §301 of the Labor Management Relations Act supports standing under WARN. The right to bargain collectively for union members does not constitute the Union their general litigating agent. The rights petitioner purports to assert here do not stem from the collective bargaining

agreement, and the Union's status as collective bargaining agent creates nothing more than the kind of "abstract concern" that is insufficient under Article III. Section 301 empowers the Union only to vindicate breaches of contractual undertakings by the employer, not to litigate tort and other statutory claims. A union without a damage claim of its own simply does not have Article III standing to maintain a non-contractual action for damages on behalf of its members. And no court has approved the standing of any association to sue for individualized damages for its constituents unless they are joined as parties.

Petitioner does not claim "associational standing" and does not attack the Court of Appeals' interpretation or application of *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Instead, it argues that its status as the collective bargaining "representative" gives it Article III standing similar to that of parties to third-party-beneficiary contracts, trustees, guardians, and the like. Petitioner does not possess the critical attributes of the "representatives" to which it likens itself and is not asserting the type of actions with which they are traditionally associated. In any event, the status as a representative, without more, does not satisfy the standing requirements of Article III. Nor can petitioner derive any comfort from the fact that certain governmental agencies are authorized to maintain actions to recover damages under the statutes they are charged with administering and enforcing. The Union is not comparable to, say, the EEOC, which is an executive-branch agency specifically created by Congress to vindicate the rights of victims of discrimination by pursuing violators of the laws which that agency administers.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISMISSAL OF THE UNION'S COMPLAINT BECAUSE THE UNION DID NOT SUFFER ANY CONCRETE, DISTINCT, AND PALPABLE INJURY THAT WAS REDRESSABLE BY AWARDS OF BACK PAY TO INDIVIDUAL PLANT WORKERS AND THEREFORE LACKS STANDING TO MAINTAIN THIS ACTION

Standing, of course, finds its roots in Article III of the United States Constitution. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Warth v. Seldin*, 422 U.S. 490 (1975). This Court has said that no principle is more fundamental to the orderly functioning of the judiciary and its commitment to decide real issues, rather than abstract questions, so as to grant judgments that redress concrete injuries instead of rendering opinions that run the risk of trampling on the separation of powers. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974).

It is also axiomatic that the plaintiff's standing must be established by the allegations of its complaint. *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court presumes that federal courts lack jurisdiction unless "'the contrary appears affirmatively from the record.'" *Renne v. Geary*, 501 U.S. 312, 316 (1991), quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986). "'It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Id.*, quoting *Warth*, 422 U.S. at 517-18. The Court cautioned in *Allen*, 468 U.S. at 752, that "[t]ypically ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plain-

tiff is entitled to an adjudication of the particular claims asserted."

The elements of Article III standing were summarized in *Allen*:

> "The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. . . .
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> "The injury alleged must be, for example, 'distinct and palpable'. . . and not 'abstract' or 'conjectural' or 'hypothetical'. . . . The injury must be 'fairly' traceable to the challenged action, and relief from the injury must be likely to follow from a favorable decision." 468 U.S. at 751 (internal citations omitted).

Petitioner's entire presentation to this Court is pegged on the assumption that WARN specifically endorses this lawsuit and automatically satisfies the requisites for standing. Petitioner has misread the WARN Act and has misconstrued this Court's standing jurisprudence.[4]

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[4] As it did in the Court of Appeals, the Union disclaims any reliance on "associational standing" (Br. 8-9) and does not request reversal based on that doctrine. Its "Question Presented" does not fairly comprise any notion of associational standing, and its Argument is limited to direct standing (Point I) and "representational" standing (Point II). Although the government, as amicus curiae on behalf of the Labor Department, seeks to inject the associational standing doctrine into the case, an amicus cannot add to the Question Presented by the petitioner and cannot expand the issues briefed by the parties. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531-32 n.13 (1979).

A. The WARN Act Does Not Specifically Designate a Union as a Proper Litigant for Back Pay for Aggrieved Plant Workers.

In 29 U.S.C. §2104(a)(1) Congress provided that an employer who fails to furnish a proper notice of a plant closing is liable "to each aggrieved employee who suffers an employment loss as a result of such closing." An "aggrieved employee" is defined in §2104(a)(7) as an employee who does not receive, directly or indirectly, the notice called for by §2102(a)(1). Section 2104(a)(1) thus limits the congressionally-created cause of action for a violation of the §2102(a)(1) notice provision to the individual "aggrieved" employees.

Petitioner argues that paragraph (5) of §2104(a) authorizes any union to seek WARN back pay for its members, but the literal language of that provision does not support such an interpretation. Paragraph (5) provides as follows:

> "*A person* seeking to enforce such liability, *including a representative* of employees *or a unit of local government aggrieved under paragraph (1) or (3)*, may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." (Emphasis added.)

The parties authorized to sue under this provision are those "aggrieved under paragraph (1) or (3)." Paragraph (1) provides back pay and certain benefits for "each aggrieved employee who suffers an employment loss as a result of such closing or layoff." Paragraph (3) imposes a "civil penalty of not more than $500 for each day of such violation," payable to the community where the plant is located. Obviously, a union as the statutory "representative of employees" is not "aggrieved under paragraphs (1) or (3)." It is therefore not entitled to bring a suit for back wages or for the fine payable to the local governmental unit.

Petitioner essentially contends that anyone mentioned in paragraph (5) automatically has standing to sue for a violation of WARN. But if that interpretation were correct, an affected unit of local government could also bring an action for back wages for the employees, and, presumably, a union could sue for the fine payable to the local community — scenarios obviously inconsistent with congressional intent, principles of grammar and syntax, and common sense. Moreover, the language authorizing suit to be brought "for such person or other persons similarly situated" cannot include the union as employee representative, for unions are not "similarly situated" with their members.

Hence, the statutory structure itself refutes the foundational predicate of petitioner's theory, *i.e.*, that Congress has specifically conferred standing on unions to sue in their own right. Read as a whole and in context, §2104(a)(5) is basically, if not entirely, a *venue* provision, designed to ensure that suits to enforce the rights created by §§2104(a)(1) and (3) can be freely brought anywhere the employer transacts business, as well as the more obvious situs of the violation.

Petitioner's repeated insistence that Congress was concerned about the rights and welfare of unions when considering plant-closing legislation, including WARN, is belied by the legislative history. Plant-closing legislation was introduced in 1987 as the Economic Dislocation and Worker Adjustment Assistance Act, S. 538, 100th Cong., 1st Sess., *reprinted in* S. Rep. No. 62, 100th Cong., 1st Sess. 45 (1987). Unlike the ultimately-adopted WARN Act, S. 538 actually would have given a real *right* to a union that received notice of a proposed plant shutdown. Section 333 of that bill allowed the "representative of the affected employees" to make a request to the employer for information concerning its financial status, feasibility studies, and relocation plans and obligated the employer to supply an appropriate response.

S. 538 included an enforcement provision, §334(a)(3), which expressly granted the union a cause of action for an employer's failure to furnish the requested information:

> "(3) Any employer who violates the provisions of section 333 shall be liable to the party requesting the information for a civil penalty in an amount not to exceed $10,000."

Section 334(a)(6) of that bill also provided venue for suits by any of the three groups of potential litigants for whom rights and remedies were specified:

> "(6) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1), (2), or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business."

Subsequent events altered the statutory scheme. The Senate incorporated S. 538 into H.R. 3, the Omnibus Trade and Competitiveness Act of 1987 (H.R. 3, 100th Cong., 1st Sess., 133 Cong. Rec. S9390 (1987)). In the process, §333 and §334(a)(3) were deleted by amendment, thereby eliminating a union's right to information and the "penalty" recoverable by the union. 133 Cong. Rec. S9367 (1987). The venue provision was accordingly revised but, without explanation, the reference to a suit by "a representative of the employee" was retained even though the union no longer had any rights.[5] This was the text which, after President Reagan's veto of H.R. 3, was reintroduced as a

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[5] Congress may have retained the reference to a "representative" (in the general sense, not as defined by the statute) because the venue provision contemplated the maintenance of class actions brought "for other persons similarly situated." A person bringing such a suit, of course, would sue as the "representative" of the class. The House conference report, in summarizing the enforcement provisions, contains no reference to suit by a union but indicates only that "A person seeking to enforce the liability provisions of this part may sue individually or on behalf of others similarly situated." *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988), *reprinted* in 1988 U.S.C.C.A.N. 1033, 2085.

separate measure (S. 2527, 100th Cong., 2d Sess. (1988)) and eventually became law.

This history demonstrates that the reference to the "representative" in §2104(a)(5) was not a conscious appointment of a union as vindicator of its members' rights but rather a mere remnant of the previous proposal in which the union was actually afforded its own right and remedy. To be sure, the venue provision as modified and finally passed retained the language referring to a "representative," but the statute gave a union no right or remedy concerning a notice. The only action to recover back pay and other benefits for the affected workers was given to those workers.

Time and again during the contentious debate over this legislation and its earlier embodiments, both proponents and opponents stated that the purpose of the proposal was to aid workers and communities.[6] The dialogue over advance notification rarely included any reference to unions or organized labor. Two of the three main House sponsors of plant-closing legislation specifically stressed that prior notification was *not* for the benefit of unions:

> "Many unions already have notice provisions in their contracts, so today's vote isn't about unions. Today's vote is about workers. It's about the 80 percent of the work force that is not represented by unions and has no protections from sudden dislocation. . . . This isn't a union bill. This is a worker's bill. This is a bill about workers, their families

[6] *See, e.g.*, S. Rep. No. 62, 100th Cong., 1st Sess. 3, 4, 12, 22, 30 (1987); 133 Cong. Rec. S9399-9400 (daily ed. July 8, 1987) (statement of Sen. Adams); 133 Cong. Rec. S9487-88 (daily ed. July 9, 1987) (statements of Sen. Kennedy and Sen. Metzenbaum); 133 Cong. Rec. S9490 (daily ed. July 9, 1987) (statement of Sen. Levin); 133 Cong. Rec. S9490 (daily ed. July 9, 1987) (statement of Sen. Dole); 133 Cong. Rec. S9491 (daily ed. July 9, 1987) (statement of Sen. Gore); 133 Cong. Rec. S9621 (daily ed. July 10, 1987) (statement of Sen. Heinz).

> and their communities." 131 Cong. Rec. H10476 (daily ed. Nov. 21, 1985) (statement of Rep. Conte regarding H.R. 1616, 99th Cong., 1st Sess. (1985).
>
> "[W]e do not need this for the auto industry. We do not need this for the steel industry, because we have union contracts in industries like that to provide for more notice, severance pay and all kinds of things that this bill does not do for them; so this bill is not for the large unionized industrial employers. They are already being responsible in a contractual way, if not any other way." 131 Cong. Rec. H10481 (daily ed. Nov. 21, 1985) (statement of Rep. Ford).

The legislative history further indicates that the reason for requiring notice to the "representative" rather than to the individual employees was so that the employer would not be forced to give personal notification to hundreds or even thousands of workers. *See* 131 Cong. Rec. H10216-17 (daily ed. Nov. 14, 1985) (statement of Rep. Ford) (the purpose of notifying the union, in the case of an organized plant, is so that the employer "does not have to call in 12,000 employees and consult; he notifies their agent that they have designated, their union, and he has complied with the notice. He does not have to go looking for 12,000 employees"); (statement of Rep. Levin) ("I believe that this provision about consulting with the representative is placed there basically for the protection of the employer"). *Id.*

Accordingly, petitioner's intense focus on "the litigation scheme" of WARN (Br. 16-27) misconstrues the statute and attributes to Congress an intent it did not have.[7]

[7] Because petitioner's Question Presented is thus erroneously premised exclusively on "Congress' express statutory authorization" for a union to sue for its members' back pay under WARN, which petitioner concedes to be a threshold issue (Br. 14), it would be appropriate for the Court to dismiss the writ of certiorari as improvidently granted.

B. Petitioner Has Not Established Any "Injury-in-Fact."

For standing purposes, a plaintiff must plead and prove that it has suffered an actionable "injury," which must be "distinct," "palpable" and "concrete," "real and immediate," not "abstract." *See Warth*, 422 U.S. at 501; *Allen*, 468 U.S. at 755-56; *Schlesinger*, 418 U.S. at 220-21; *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). And the injury must be to a "legally-protected interest." *Lujan*, 504 U.S. at 560. Petitioner's claim does not pass this test.

This "injury-in-fact" requirement imposes the obligation on a would-be plaintiff to allege "specific, concrete facts demonstrating that the challenged practices harm *him*." *Warth*, 422 U.S. at 508 (emphasis in original). Quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973), the Court in *Warth* also stated:

> "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" 422 U.S. at 499.

Accord, *Gladstone, Realtors*, 441 U.S. at 99.

Yet in its complaint petitioner specifically and repeatedly alleged that it was suing "on behalf of" the affected plant workers. Nowhere did it plead that respondent's actions had caused the Union itself any harm. Whatever the statutory intendment, in *this* case *this* union did not *plead* that its failure to receive an appropriate notice caused any injury to itself. Its complaint was therefore properly dismissed because it did not plead the first element required for constitutional standing.

In this Court the Union's brief advances the unpleaded thesis that WARN gives it a "statutory" or "legal" right to notice of plant closing (Br. 11, 36) and that a misaddressed or deficient

notice is a distinct and palpable injury to the Union itself. This revisionist appellate advocacy runs afoul of the very provisions of the WARN Act, which consistently identify the right to notice as belonging to the employees. The title of §2102(a) is: "Notice to employees, state dislocated worker units and local governments." Nothing about unions. Section 2107(b), which specifies alternative ways to provide notice, characterizes them as other "acceptable methods for fulfillment of the employer's obligation to give notice *to each affected employee under this Act*." *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1051 (1988) (underscoring that the notice belongs to the employee by referring to its receipt "either directly or through the employee's representative"); *see also* 29 U.S.C. §2105 (which is captioned "Procedures in addition to other rights of *employees*" and which references the "rights and remedies provided to *employees* by this Act").[8]

Petitioner's recurring contention that the notice was designed to enable it to take various steps to protect its own interests (Br. 11) or the employees (Br. 19) finds no support in the statute or in the record. The Union's only role under WARN is that stated in §2102(a)(1), *i.e.*, to serve as the conduit to the affected employees for notice from the employer. Congress did not empower a union to do *anything* with a notice, and did not authorize it to do anything based on non-receipt of a notice. As explained above, Congress created the statutory notice requirement primarily for the benefit of non-union workers.[9]

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[8] In its regulations promulgated under WARN, the Department of Labor likewise has emphasized that the purpose of the Act is to provide "protection to workers, their families and communities by requiring employers to provide notification." 20 C.F.R. §639.1(a). Unions are conspicuously and significantly absent from that list of protected entities. *See also* 20 C.F.R. §639.2 (stating that WARN requires employers to give "affected employees at least 60 days' notice").

[9] The Union's assertion that WARN imposes a legal duty which "flows" "to the Union *alone*" (Br. 25), and the union amici's argument that WARN

(Footnote 9 continued on next page)

In Article III parlance, the Union's entitlement to receive a WARN Act notice is not a "legally-protected interest." If it can be called a "right" at all, it is a purely "procedural right" to facilitate the *employees*' substantive rights. The only "distinct," "palpable," "concrete" or "real" injury resulting from a misaddressed or deficient notice is felt by those employees, not by the Union.

This is further demonstrated by WARN's remedial scheme in §2104. Section 2102(a) does not create a cause of action and does not declare that it is unlawful for the employer to fail to send a proper notice. Section 2104(a)(1) creates a liability for such a failure, expressly restricted to "each aggrieved employee." The Act specifically prohibits any kind of injunctive relief, whether to compel the issuance of a notice to the union, to prevent any employer action until after delivery of a proper notice to a union, or to require the plant to remain open. 29 U.S.C. §2104(b). Nor is the union entitled to damages.

Petitioner's claim that its role as designated recipient of notice gives *it* a legal right entitling it to maintain this action on its own behalf is essentially identical to the claim asserted by the plaintiffs in *Lujan*, 504 U.S. 571-72, that they had suffered a "procedural injury" arising from the failure of federal agencies to engage in inter-agency consultation pursuant to the Endangered Species Act. Although the nature of the relief sought is admittedly different here, the present scenario is nonetheless identical to *Lujan* in that:

> "This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their

(Footnote 9 continued)

Act rights are "fundamentally collective in nature" with "[t]he principal rationale" of allowing unions to help employees with reemployment (Union Amici Br. 11, 13), are particularly blatant distortions of the statute.

> license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." 504 U.S. at 572.

Here, as there, the alleged violation of this "procedural right" does not create any "injury-in-fact" to the Union. Petitioner suffered no "concrete" or "particularized" consequences, or any "distinct" or "palpable" injury, from the supposedly deficient notice because it was not directly affected by the notice. Its lack of standing flows directly from *Lujan's* rejection of the theory that "violation of a . . . procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)." 504 U.S. at 573 n.8. *See also Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336 (1980) (appellants had Article III basis to appeal denial of class certification, not because of their "interest" in a correct procedure, but because of their alleged economic interest in shifting costs of litigation to the class); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 410 (1980) ("Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject — or with the rights of third parties — for the concrete injury required by Art. III") (Powell, Stewart and Rehnquist, JJ., dissenting).

Petitioner's reliance on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (Br. 15), is misguided for two reasons. There, Congress had declared it "unlawful" to fail to provide certain information about available housing, and in upholding standing the Court emphasized that it was that term in §804(d) of the Fair Housing Act that established "an enforceable right to truthful information," the violation of which constituted Article III injury. *Id.* at 373-74. Furthermore, the *organization* granted standing for itself in *Havens* did *not* predicate its standing on this "right"; it was allowed to proceed based on concrete, specific

allegations of interference with its ability to render counselling and referral services. *Id.* at 379.[10]

Petitioner's claim of "injury-in-fact" also appears to hinge heavily on the theory that recovery of monetary damages by its employees may serve a deterrent function (Br. 21). This "interest" does not fill the Union's injury void. There is nothing in the pleadings to establish "injury" to such an "interest" or to indicate that any presumed deterrence purpose has any relevance to *this* petitioner or to *this* case. The record is barren of any showing that petitioner represents respondent's employees at other plants which, but for such presumed deterrence, might conceivably be closed without compliance with the WARN Act. There is no averment that recovery by the Dixon employees will alter respondent's behavior in other locations.[11]

Apart from its core claim that its role as agent for receipt of notice gives rise to a legally enforceable right, petitioner and its amici seek to bootstrap petitioner into Article III through various essays on the general prominence of unions in the context of plant closings. In particular, both the government (U.S. Amicus Br. 16) and the unions (Union Amici Br. 15) argue that notice is important to a union because it facilitates the union's right to bargain with the company over the effects of a plant shutdown. Whatever the general relevance of such a proposition, it has no

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[10] These are the kinds of allegations (injury to "concrete programmatic organizational interests," *i.e.*, to the organization's operations or to the work in which it is engaged) which the courts recognize when they grant an organization standing to sue on its own behalf. *Compare Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) *with Mountain States Legal Found. v. Costle*, 630 F.2d 754, 767 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981).

[11] Likewise, the Eighth Circuit correctly rejected the suggestion that the Union sustained Article III injury on the basis of lost dues it would have received from respondent's workers. As the Court of Appeals noted, petitioner had never made any such allegation of injury in the district court. 50 F.3d at 1429 n. 4.

application here because the collective bargaining agreement between petitioner and respondent specifically acknowledged the right of the company "to close a plant permanently" and provided severance pay and other benefits for the affected employees in such an event (JA 51). In return, the Union formally waived any other rights to negotiate "concerning the decision to close a plant and concerning the effect of such a decision upon the affected employees" (JA 52).

As for the other theoretical opportunities that might be available to a union if it had 60-days' advance notice of a proposed plant closing, suffice it to say that these ethereal musings about the mission of organized labor (a) were not pleaded and do not otherwise appear in the record, (b) fallaciously assume that a union will not otherwise learn of a plant-closing decision until after the gates have been locked forever, and (c) hardly qualify, in any event, as concrete "injury-in-fact."

C. Petitioner Has Not Established That Any Alleged Injury to It Was Redressable in This Case.

In addition to "injury-in-fact," Article III requires that the injury asserted must be likely to be redressed or remedied by the relief sought. *Allen*, 468 U.S. at 751 ("relief from the injury must be 'likely' to follow from a favorable decision"); *Simon*, 426 U.S. at 38 (plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision"); *Lujan*, 504 U.S. at 561 (likelihood of redress must not be merely speculative). This element recognizes that Article III judicial power "exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth*, 422 U.S. at 499. Hence, a claimant must demonstrate "that he personally would benefit in a tangible way from the court's intervention." *Id.* at 508.

The redressability component "examines the causal connection between the alleged injury and the judicial relief requested."

Allen, 468 U.S. at 753 n.19. This necessarily entails analysis of the specific relief sought by the would-be litigant against the background of its "injury." Petitioner here prayed for a monetary award to the former Dixon plant workers and did not seek anything for itself for *its* putative "injury." But back pay for employees would not, and could not as a matter of law, redress any supposed "injury" to petitioner attributable to a defective notice of proposed plant closing. If any such "injury" existed, it could be repaired only by an order which in some fashion would delay the time for closing the Dixon plant until 60 days after delivery of a proper notice. No such injunction was sought here for the obvious reason that WARN expressly prohibits it. 29 U.S.C. §2104(b).

The Court of Appeals succinctly analyzed both the redressability defect arising from petitioner's prayer for relief and the inherent infirmity which afflicts any WARN suit by a union:

> "The [Union], even if it has properly pleaded injury to itself as a result of the alleged failure of statutory notice, has not sought a specific remedy for its injury. An award of monetary damages to any aggrieved employees would do nothing to remedy the alleged failure of notice to the [Union]." 50 F.3d at 1430.[12]

In *Simon* this Court denied standing to indigents who sued the IRS for arguably violating the law by allowing favorable tax treatment to hospitals which did not give full service to poor people. The Court's determination was based on the fact that

[12] The criticism of this analysis by the United States (U.S. Amicus Br. 18) is disingenuous. This Court in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), did not intimate that the rights of applicants who were denied housing "conferred" rights on current residents or that an injury to the applicants was redressable by relief to the tenants. Rather, the current residents' standing was based entirely on the allegation of separate injuries to their own personal interests. *Id.* at 208, 209-10.

"the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire." 426 U.S. at 45-46. Here, the complaint does not merely hint at the absence of a substantial likelihood of redress; it shows conclusively on its face that there is no remedy available to the Union for the asserted "notice" injury. There is no way that an award of monetary damages to employees in an action filed in June 1992 (after the plant was closed) will redress a union "injury" from a defective notice in January 1992.

In *City of Los Angeles*, 461 U.S. at 105 & 107 n.8, the plaintiff had indisputably suffered a past injury from a chokehold but lacked standing to pursue injunctive relief because there was a fundamental discontinuity between the proven injury and the relief sought. This case features a similar disconnect, in that the relief prayed for would not and could not alleviate any injury experienced by the Union. *See also Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (no standing to challenge data used by Secretary of Commerce because plaintiffs did not establish that "more accurate" data would have altered the result); *Safir v. Dole*, 718 F.2d 475, 480 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984); ("the constitutional requirement of standing was not met because the prospect that the remedy sought would produce tangible benefit to the plaintiffs was speculation"); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267-68 (9th Cir. 1982) (Congressional grant of "standing" for environmental concerns did not permit review of appropriations because decree "would be ineffective to vindicate environmental concerns"). *Cf. Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540-43 (1983) (indirect and speculative nature of union's claimed injuries prevented standing under the antitrust laws).

Petitioner's effort to establish redressability by reference to a purported function of the notice to facilitate the union's role in assisting employees (Br. 24) is untenable. Petitioner does not point to anything in the statute or its legislative history to indicate

that this was the purpose of the notice, and as discussed above, it was not. Petitioner also fails to explain how a monetary award to the employees, made years after the plant closing, will redress or assist the union's response to the closing.

Petitioner's theoretical interest in deterrence cannot transform this case into an Article III controversy. It is inherently and inevitably speculative whether a monetary award to the Dixon plant workers will have any effect on Brown's future conduct or on that of any other employer. Certainly nothing in the record warrants a finding of any such deterrence.

The Union is thus similarly aligned with the mother who failed to establish standing in *Linda R.S.* She sought enforcement of a statute which was triggered by the father's failure to support a child and which created "a completed offense with a fixed penalty." 410 U.S. at 618. In denying standing, this Court stated that "The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.* Here, where the "fixed penalty" for the "completed offense" is not the incarceration of an individual but simply a monetary award to be paid by a large corporation, the idea that enforcement of the statute will alter future behavior is equally speculative in the Article III sense (and probably more speculative in the colloquial sense).

The redressability defect in this lawsuit does not, as petitioner and its amici urge, impinge on Congress' discretion to choose a remedial scheme. The decision below has no effect on the scheme adopted by Congress — monetary awards to employees. Congressional "discretion" simply does not extend to the annointing of a particular litigant in violation of Article III.

D. The WARN Act Does Not Displace These Article III Requirements.

At bottom, the Union's position before this Court is that Congress, by granting it the right to receive a notice under

WARN, and supposedly to sue on behalf of its members, has *ipso facto* conferred standing on it to enforce the WARN Act and that such action is appropriate because petitioner is the authorized collective bargaining representative for its members (Br. 12). The Union's simplistic syllogism ignores some fundamental and dispositive considerations. "Standing does not refer simply to a party's capacity to appear in court." *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Even if Congress has created the capacity in the Union to sue under WARN, that is not determinative of the standing question, for Congress unquestionably cannot override the requirements of Article III. *Gladstone, Realtors*, 441 U.S. at 100 ("In no event . . . may Congress abrogate the Art. III minimum: A plaintiff must always have suffered 'a distinct and palpable injury to himself' . . . that is likely to be redressed if the requested relief is granted"); *Association of Data Processing Ser. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Simon*, 426 U.S. at 41 n.22; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 & 487 n.24 (1982). A congressional authorization to sue "does not of its own force establish that there is an injury in 'any person' by virtue of any 'violation.'" *Lujan*, 504 U.S. at 580 (Kennedy and Souter, JJ., concurring).

The Union's total dependence on Congress' alleged conferral of capacity to sue is unjustified, for this Court must independently scrutinize all claims to standing. For example, in *Lujan* standing was denied notwithstanding the fact that the plaintiffs, as citizens, were members of the class specifically permitted by Congress to bring suit. Indeed, the Court described the Court of Appeals' contrary conclusion, based upon the "procedural right" contained in the statute, as "remarkable." 504 U.S. at 572. In response to the very thesis advanced here by petitioner, the *Lujan* Court said:

> "[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the

courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch — one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches." 504 U.S. at 576.

Other decisions of this Court have likewise found standing wanting in the face of a congressional grant of capacity to sue. In *Sierra Club*, the Court dismissed a suit by an environmental group which tried to block development of a ski resort in a national forest. The organization claimed to be "aggrieved" and "adversely affected" pursuant to section 10 of the Administrative Procedure Act. The Court ruled that not only must there be injury to a cognizable interest but that the "party seeking review be himself among the injured." 405 U.S. at 735. Even though the Sierra Club was earnestly devoted to the cause espoused, its claim was not justiciable:

> "But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Id.* at 739.

Accord, *Simon*, 426 U.S. at 45-46 (individuals have no standing, despite APA, in the absence of concrete injury and the "substantial likelihood that victory in this suit would result in" their achieving the remedy they desire).

Of particular relevance is *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), *aff'd*, 454 U.S. 1025 (1981). After the Senate confirmed the appointment of former Congressman Abner Mikva as a Circuit Judge for the District of Columbia Circuit, Congress also enacted a provision which authorized any senator or representative to file suit to challenge that particular appointment on the grounds of a violation of the "ineligibility clause" of the Constitution.

A lawsuit filed by Senator McClure pursuant to this provision was dismissed by a three-judge district court for lack of an Article III case or controversy. Pointing out that in the absence of a statute authorizing such suits a senator would plainly lack standing (*e.g.*, *Ex parte Levitt*, 302 U.S. 633 (1937)), the court held that Congress could not cure the jurisprudential deficiency by mere legislative fiat. 513 F. Supp. at 271. The court said that Article III — and the separation of powers doctrine which underlies it — could not be circumvented by the simple expedient of a congressional conferral of capacity to sue where the traditional trappings of a case or controversy were not present. *Id.*[13] In sum, then, a congressional grant of authority to sue may be the beginning — but is never the end — of the Article III standing inquiry.

In assuming below that injury-in-fact existed, the Eighth Circuit relied on a statement in *Linda R.S.* (quoted in *Warth* and *Havens*) that Congress can create rights, the violation of which will satisfy Article III requirements. 50 F.3d at 1430. But the court misconstrued *Warth* and *Linda R.S.* As Justice Scalia explained in *Lujan*:

> "Both of the cases used by *Linda R.S.* as an illustration of that principle involved Congress's elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law .... As we said in *Sierra Club*, '[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different

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[13] In the same vein, the First Circuit in *Conservation Law Found. v. Reilly*, 950 F.2d 38 (1st Cir. 1991), and *United States v. AVX Corp.*, 962 F.2d 108 (1st Cir. 1992), dismissed environmental claims for lack of standing despite the fact that the plaintiffs fell within the class of persons expressly granted capacity to sue by Congress.

matter from abandoning the requirement that the party seeking review must himself have suffered an injury.'" 504 U.S. at 475, quoting *Sierra Club*, 405 U.S. at 738.

This conclusion is buttressed by the opinion of Justices Kennedy and Souter in *Lujan*, joining in the "procedural injury" portion of Justice Scalia's analysis. In Justice Kennedy's words, to exercise the power to define injuries and articulate chains of causation to satisfy Article III:

> "Congress must at the very least identify the injury it seeks to vindicate and *relate the injury to the class of persons entitled to bring suit.*" 504 U.S. at 580 (emphasis added).

In *Lujan* the Endangered Species Act flunked this test because it did not "of its own force" establish that there was an identifiable injury to the class of persons to whom it purported to give the keys to the courthouse. Here, in comparable fashion, Congress did not identify *any* injury to the union and did not connect any such injury to a suit by a union to recover monetary damages for the injury suffered by the individual workers. Even giving full weight to the congressional direction in WARN that the employer's notice be delivered to the union, petitioner's plight is akin to that of the plaintiffs in *Schlesinger*, 418 U.S. at 223 n. 13, who merely experienced an "abstract injury in nonobservance of the Constitution," or the complainants in *Valley Forge*, 454 U.S. at 485, who failed "to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." This Court's words in *Allen* are fully applicable:

> "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystand-

> ers.'" 468 U.S. at 756, quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973).[14]

This Court's precedents which have seemingly approved a congressional expansion of standing have, in reality, merely recognized that "Congress may expand standing to the full extent permitted by Art. III." *Gladstone, Realtors*, 441 U.S. at 100; *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (finding standing under statute conferring capacity on "any individual eligible to vote" only because certain appellants alleged a personal stake that permitted "specific relief of a conclusive character"); *Warth*, 422 U.S. at 501. This principle inherently acknowledges that Article III is an independent, external constraint on Congress to be implemented by the judiciary. *See also Simon*, 426 U.S. at 41 n.22 (stating, immediately after recognizing that Congress can create interests, the invasion of which will confer standing, that "[w]hen Congress has so acted, the requirements of Art. III remain").

To interpret a statute to thrust onto a court a particular claim that is not part of the judiciary's traditional, proper, and limited caseload in the constitutional framework would be to sanction a violation of the separation of powers by Congress. *See Muskrat v. United States*, 219 U.S. 346, 355 (1911) (congressional enactment requiring courts to determine rights in absence of contested case or controversy is unconstitutional because "[t]he power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other"), quoting *Gordon v. United States*, 117 U.S. 697, 700 (1864). As Professor Brilmayer explained in her landmark article, allowing a person

[14] Other circumstances exist where a union is statutorily entitled to information from an employer but cannot use an Article III court to enforce that obligation. The duty to bargain collectively under under 29 U.S.C. §158(a)(5), for example, includes the duty to provide relevant information to the union, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979), but a union may not enforce that duty by seeking contempt. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 269-70 (1940).

without standing to bring a lawsuit undermines the basic power and effectiveness of the judicial system. Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297, 304-05 (1979).

Contrary to petitioner's protestations (Br. 13), there are no distinct Article III rules for cases involving private parties, and separation-of-powers concerns are not limited to instances in which litigants seek to use the courts to challenge governmental action. Quite apart from confining the judiciary to its proper role *vis-a-vis* other branches of government, strict enforcement of Article III in *all* cases is demanded by the principle of separation of powers in order to promote the practical and moral authority of judicial review. In *Valley Forge*, 454 U.S. at 471, the Court put it this way:

> "The power to declare the rights of individuals . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Otherwise, the power 'is not judicial ... in the sense in which judicial power is granted by the Constitution to the courts of the United States.' *United States v. Ferreira*, 13 How. 40, 48 (1852)."

See also Lujan, 504 U.S. at 580 ("This Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitation found in Article III") (Kennedy and Souter, JJ., concurring); *Honig v. Doe*, 484 U.S. 305, 340-41 (1988) (Scalia and O'Connor, JJ., dissenting).[15]

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[15] Thus, although *Lujan* did not decide on its face that the principle set forth in *Warth* and *Linda R.S.* cannot be expanded in situations which do not involve suits against the government, there is no principled basis to take a different view of Article III in cases between private parties. There are still separation-of-powers constraints in those actions. In fact, the thrust of

(Footnote 15 continued on next page)

Prohibiting Congress from manufacturing standing when there is none under Article III is not an intrusion on or inconsistent with the separation of powers, as petitioner and its amici seem to urge. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61-62 (1982) (Court has responsibility, notwithstanding deference owed to congressional decision to provide jurisdiction to non-Article III judges, to determine "whether the action of that branch exceeds whatever authority has been committed" to Congress by the Constitution); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The refusal to exercise jurisdiction in such circumstances reaffirms the primacy of Article III as an absolute limit on the jurisdiction of the federal courts and thus implements the separation of powers.

II. PETITIONER DOES NOT HAVE STANDING TO BRING A WARN ACTION FOR BACK PAY FOR AFFECTED PLANT WORKERS ON A "REPRESENTATIVE" BASIS.

A. Standing Is Not Conferred by the Union's Status as Collective Bargaining Agent or by Section 301 of the Labor Management Relations Act.

1. The Union is not the general litigating agent for its members.

The Union repeatedly maintains that its standing to sue flows naturally from its status as exclusive bargaining representative of its members (Br. 10, 16, 17, 25-26, 36-46).[16] But the rights

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(Footnote 15 continued)

scholarly commentary on this Court's Article III jurisprudence suggests that there should be broader or more generous standing for suits challenging governmental action. *See, e.g.*, Tushnet, *The "Case" or "Controversy" Controversy*, 93 Harv. L. Rev. 1698, 1708-09 (1980).

[16] It is unclear from petitioner's brief whether it believes that its "representational" status confers standing to sue in its own right or only on behalf of its

(Footnote 16 continued on next page)

which it purports to assert here do not stem from a breach of the collective bargaining agreement, and the Union does not seek any recovery for itself. Accordingly, the Union's status as collective bargaining agent creates nothing more than the kind of "abstract concern" found to be inadequate in *Simon*, 426 U.S. at 40, and *Warth*, 472 U.S. at 515. It is the type of generalized "interest in the subject" deemed insufficient in *Sierra Club*, 405 U.S. at 739.

It has been repeatedly held that a union is not the "general litigating agent" for union members and does not have standing to sue on their behalf for violations of federal statutes or common-law rights. In *United States ex rel. United Brotherhood of Carpenters & Joiners v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976), the court denied standing to a union to file claims under the Miller Act on behalf of its members to obtain retroactive pay increases under an alleged collective bargaining agreement. Commenting that a contrary interpretation would create a "host of problems" *id.* at 1151 n.4, the court rebuffed the union's plea that it could sue because it was seeking wages on behalf of the members as the authorized representative under the collective bargaining agreement:

> "A collective bargaining contract, even where one is signed, is not a contract for the performance of services; it governs only the general rules of conduct between employer and employee. The right to the payment of money in this case remains with the individual employees for it is they, not the unions, who performed the services." *Id.* at 1151.

(Footnote 16 continued)

members. What is clear, though, is that the Union's position on this issue in this Court is 180 degrees from the argument made in the Court of Appeals, where Point D of its argument was captioned "Local 751 Has Standing In Its Own Right Under WARN, Not Representational Standing." (UFCW Br., 8th Cir., No. 94-1929, p. 10).

Addressing the contention that §301 of the LMRA, 29 U.S.C. §185, empowered the union to maintain such a lawsuit, the court said:

> "We disagree. While §301(b) does give a union capacity to sue and be sued as an entity under the LMRA, it does not appoint the union as the general litigating agent of its members . . . . Section 301(b) is simply a rule defining capacity to sue and does not give the unions [*sic*] a general right to represent its employees." *Id.* at 1151.

In *United Brotherhood of Carpenters & Joiners v. Ohio Carpenters Health & Welfare Fund*, 926 F.2d 550 (6th Cir. 1991), the court refused to permit a union to maintain an action for reimbursement of check-off dues under the Labor-Management Reporting and Disclosure Act, even though the statute provided that any persons whose rights under the statute were infringed could bring an action in federal court. The court concluded that the issue of standing must be determined by reference to the class of persons the statute was designed to protect, and noted that the statute "confers rights on members, not persons or labor organizations." *Id.* at 556. There, as here, the error in the union's standing analysis was that it "attempt[ed] to derive rights inuring to its own benefit from statutory provisions creating procedural safeguards for the rights of individual union members." *Id.* at 554.

See also United Steel Workers v. University of Alabama, 599 F.2d 56 (5th Cir. 1979) (union denied the right to assert a claim for damages for constitutional violations on behalf of members); *Local 194, Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976) (no union standing to sue for back pay under Title VII or §1981 even though unions are included among entities authorized to sue by Title VII); *New Beckley Mining Corp. v. International Union, United Mine Workers*, 18 F.3d 1161 (4th Cir. 1994) (union lacks standing to sue under RICO for misuse of federal training funds that alleg-

edly should have gone to individual members); *United Union of Roofers v. Insurance Corp. of America*, 919 F.2d 1398 (9th Cir. 1990) (union has no standing to assert members' claims for past wages secured by payment bond); *United States v. City & County of San Francisco*, 979 F.2d 169, 170-72 (9th Cir. 1992) (union lacks standing to appeal order approving promotion of candidates); *Brotherhood Ry. Carmen v. Delpro Co.*, 549 F. Supp. 780, 783-84 (D. Del. 1982) (union lacks standing to pursue back wages, benefits, or punitive damages under the Railway Labor Act on behalf of individual members; "There is a vast difference between having representative status to urge individual member's claims flowing from breach of a collective bargaining contract and associational standing to urge individualized member's damages for alleged violation of a federal statute").

2. Section 301 does not supply standing to assert claims for non-contractual damages.

In a related argument, petitioner suggests that §301 of the LMRA, 29 U.S.C. §185, supports its constitutional right to file this action (Br. 34-35). But that statute merely authorizes suits by a union for breaches of a contract with an employer to which the union is a party. There is surely nothing surprising about the proposition that a breach of contract creates a cognizable legal injury to the contracting party. In fact, claims for breach of the collective bargaining agreement *must* be brought by the union and cannot be asserted by individuals (who, after all, are not parties to the contract) unless the rights in question are "uniquely" personal rather than collective. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Gutierrez v. United Foods, Inc.*, 11 F.3d 556, 562 (5th Cir. 1994). But, as reflected by the previously-cited line of union cases such as *Woerfel Corp.*, 545 F.2d 1148, §301 does not somehow entitle a union to be the litigation torch-bearer for its members for other purposes.

Petitioner reads *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), as saving the day. *Hoosier Cardinal*, though, was by its terms limited to lawsuits brought to recover benefits "pursuant to the terms of a collective bargaining contract." *Id.* at 699. The Court emphasized that such an action is expressly authorized by §301's reference to "suits for violation of contracts between an employer and a labor organization" and that the union was simply implementing its role in the collective bargaining process. There was no discussion of Article III standing in *Hoosier Cardinal*, no doubt because the union as contracting party had undeniably suffered a cognizable injury that would be redressed by enforcement of the contract. The effort to equate this case with *Hoosier Cardinal* (Br. 35) is fatally flawed; it begs the dispositive question by assuming that the Union itself has suffered a legal injury under WARN and that the statutory remedy will redress that injury.[17]

3. No court has permitted an organization which has no damage claim of its own to sue for damages to its members without joining those members.

The previously-cited union cases also reflect the continuing vitality today of the statement made 20 years ago in *Warth*, 422 U.S. at 515, that associational standing has been approved only where the relief sought is a declaratory judgment, injunction or some form of preliminary relief.[18] As recently as 1990, standing still had never been upheld for an organization seeking damages on behalf of its members. *See National Ass'n of Realtors v. National Real Estate Ass'n*, 894 F.2d 937, 941 (7th Cir. 1990)

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[17] The Union's reliance on §301 is also severely strained because if its authority to bring suit on behalf of its members stemmed in any way from its status under the collective bargaining agreement, the parties have agreed all such disputes must be resolved by arbitration (JA 55).

[18] Perhaps this impediment explains why petitioner eschews any reliance on principles of "associational" standing (Br. 8-9).

("associations have been held to have standing under Article III of the Constitution to seek injunctive relief — but never damages, for reasons our earlier discussions may have helped clarify — on behalf of their members").

See also Telecommunications Research & Action Center v. Allnet Communication Services, Inc., 806 F.2d 1093, 1095 (D.C. Cir. 1986) ("lower federal courts have consistently rejected association assertions of standing to seek monetary, as distinguished from injunctive or declaratory, relief on behalf of the organization's members"); *Kansas Health Care Ass'n v. Kansas Dep't of Social & Rehabilitation Services*, 958 F.2d 1018 (10th Cir. 1992) (association does not have standing to assert claims for members where court would be required to examine evidence particular to individual members and individual participation would be required); *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979) (association has no standing to sue for damages to members under Clayton Act).[19]

The Union sensibly anticipates the problems created by the individual relief sought on behalf of some 277 plant workers and artificially suggests that a "one size fits all" remedy is appropriate here, thereby supposedly eliminating the need for individualized relief or participation (Br. 23). Although WARN itself characterizes the relief available to affected plant workers as "back pay," petitioner and its amici strive to divert attention from the need for individualized assessments by variously mischaracterizing such damages as "akin to an equitable rem-

[19] This Court in *International Union, UAW v. Brock*, 477 U.S. 274 (1986), reversed a ruling that had precluded a union from pursuing claims on behalf of its members, not because the union had standing to assert individual damage claims, but because the lower courts had misconstrued the nature of the relief being sought. That relief did not include damages for individual members, and "[n]either these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member." *Id.* at 287.

edy" (Br. 21), "easily calculated" (Br. 23), "liquidated damages" (Br. 21), and a "penalty" (Br. 23).

These attempts to homogenize the required damage calculations ignore the reality of this case. Under WARN, every employee who is deprived of an appropriate notice of plant closing is entitled to certain relief, denominated "back pay for each day of violation" (29 U.S.C. §2104(a)(1)(A)), and other monetary recompense. These statutory elements necessarily involve individualized issues. *See* §§2104(a)(1) and (2). Moreover, because the Union's contract for the Dixon plant provided piece-work compensation for all employees, proof of damages for each of the 277 workers would require establishment of each of the following personalized elements:

(1) The higher of his average pay rate for the last three years or his final regular rate (§2104(a)(1)(A)(i), (ii)), taking into account his individual piece-work rate for the period in question (JA 21);

(2) His lost benefits, including the cost of medical expenses incurred which would have been covered by the employer's plan (§2104(a)(1)(B));

(3) The number of days by which notice to him was deficient, up to a maximum of 60 days (*id.*);

(4) Any credits and/or offsets against his recovery allowed by §2104(a)(2).

Again, it is no answer that Congress has created "capacity" to sue for such damages because the need for individualized proof to recover those damages is part of the Article III requirement of redressability, which cannot be abrogated and which dictates that damage claims can only be pursued by the affected individuals. *Warth*, 422 U.S. at 515-16.

Petitioner concludes its brief by criticizing the Court of Appeals' analysis of "associational standing" and its application of *Hunt v. Washington State Apple Advertising Comm'n*, 432

U.S. 333 (1977). The Union does not argue for reversal on the basis that the Court of Appeals' interpretation of *Hunt* was erroneous, but insists instead that *Hunt* is inapplicable because only voluntary associations need to pass the *Hunt* test in order to possess standing.[20] This unsupported theory is refuted by the very facts of *Hunt* — the Washington Apple Advertising Commission was not a voluntary association, but was a creature of statute imposed on the state apple growers and financed by statutory assessments. Petitioner's position is also, of course, incompatible with this Court's application of *Hunt* in *Brock*, which involved a union, and with the consistent reliance on *Hunt* by the courts of appeals when assessing union standing. *See* pages 33-34 *ante*.

Petitioner then compounds this misinterpretation by claiming that the "individual participation" requirement of *Hunt* is a purely prudential test used only to measure the manageability of suits (and, again, only for voluntary associations) (Br. 45). This is a manifest misreading of *Hunt*, which stated that it was addressing standing "in a constitutional sense," derived its entire three-part test from the discussion of Article III in *Warth*, and enunciated the "individual participation" requirement based on the redressability problem posed by associational damage suits. *See Hunt*, 432 U.S. at 341-43.[21] Again, in *Brock* this Court addressed all three *Hunt* requirements and applied them to a

[20] The government's gratuitous and inappropriate attempt to transform this into an associational standing case, in light of petitioner's express disclaimer of such a theory, erroneously relies, *inter alia*, on cases in which the plaintiff was an individual who had suffered injury himself and sought to represent those similarly situated — as for instance under the FLSA or Rule 23 (U.S. Amicus Br. 26-27) — and on cases brought by federal agencies (*id.* at 27-28).

[21] Amicus unduly trivializes these concerns by characterizing them as merely relating to the "form — as opposed to the substance — of a plaintiff's proof" (U.S. Amicus Br. 26). The standing defect when individual relief is needed was articulated in *Warth* as part of the fundamental Article III requirement for "standing to invoke the court's remedial powers." 422 U.S. at 515.

union as part of what was avowedly an Article III inquiry. *See* 477 U.S. at 281.

Petitioner's use of the term "self-appointed" to characterize and purportedly distinguish the associational litigants in *Hunt* and *Brock* is a semantical shell-game. This Union is every bit as "self-appointed" a litigant as either of those plaintiffs. Congress did not "appoint" the Union to sue under WARN; the Union has no obligation to litigate, for Congress authorized the affected employees themselves to sue.[22] As described in the foregoing sections, both precedent and policy demonstrate that a union's statutory certification as collective bargaining representative is not a congressional "appointment" as a litigating representative for this distinct statutory issue. Neither the WARN Act nor the collective bargaining certification *per se* supplies the elements required by Article III.

As for the application of *Hunt*, suffice it to say — even though petitioner has not charged the Eighth Circuit with interpretational error — that the Court of Appeals was correct in finding that the third requirement of *Hunt* was not satisfied here. As noted previously, the participation of individuals is necessary, and the Union, purporting to sue for the rights of others, is not asserting a claim of distinct and palpable injury to itself which can be redressed by a favorable decision, as required by bedrock Article III doctrine. As this Court reminded us in *Warth*, 422 U.S. at 501-02, quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974):

> "Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains:

[22] The congressional grant of capacity to sue in §2104(a)(5) does not distinguish this case from *Hunt* because the Commission there was also authorized by statute to sue. *See* 432 U.S. at 339 n.3. The Court did not deem that authorization significant for Article III analysis.

the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants . . . . Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'"

B. Principles of Third-Party-Beneficiary Contracts and Enforcement Actions by Government Agencies Are Inapposite to the Standing Issue Presented Here.

The Union also seeks comfort in two other classes of cases which it claims support, by analogy, its standing to sue in this case (Br. 32-34). The comparisons advanced by petitioner are not even marginally persuasive.

Petitioner first maintains that the law of third-party-beneficiary contracts justifies a suit on behalf of its members, even though it is not seeking any relief for itself. This argument is far afield. In the first place, the third-party-beneficiary doctrine arises by definition in contract, not in tort or by statute, as here. It is based upon an express agreement by two contracting parties, A and B, to confer a benefit upon a third party, C. Most of the litigation in the law of third-party beneficiaries involves C's right to assert claims under the contract against A and/or B.

The Union cites no cases in which B — the promisee — was permitted to sue for damages for C without asserting some right to relief for itself. The only authority proffered by petitioner is *Corbin on Contracts*, §812, where the author makes reference to a "few" cases in the United States "that allow the promisee to sue as 'trustee' for the beneficiary, and to recover *not merely his own damages* but also the damages suffered by the beneficiary by reason of the promisor's breach of contract." (Emphasis added.) The author also cautions that some states have provided by statute for such an action. *Id.*

The third-party-beneficiary analogy is wide of the mark for at least four reasons: (1) the right-to-sue issue in those cases is more accurately couched in terms of state-law principles of "real party in interest," not Article III case or controversy requirements, and in any event state courts frequently have standing rules that are more relaxed than Article III; (2) the promisor, by expressly contracting with the promisee to confer a right on the third-party beneficiary, plainly subjects itself to a specific performance suit by the promisee if it fails to perform; (3) in contrast, the promisee is authorized to assert a claim for damages only if it has been injured and is seeking damages for itself; and (4) there is no authority for allowing the promisee to assert damage claims on behalf of a large number (say, 277) of would-be third-party beneficiaries.

Petitioner next tries to liken itself to governmental agencies, such as the EEOC, which are authorized by Congress to file damage claims on behalf of alleged discriminatees (Br. 33-34). The Union's citation of *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985), is curious, as the case contained no discussion of standing whatsoever. Nor was *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980), a standing case. The issue in *General Telephone* was whether the EEOC was required to comply with Fed. R. Civ. P. 23 when bringing an action for class-wide relief for victims of alleged discrimination. The Court emphasized the statutory mission of the EEOC to eradicate the effects of past discrimination. It ruled that the requirements of Rule 23 were inapplicable because the EEOC was not "merely a proxy for the victims of discrimination," *id.* at 326, and that EEOC enforcement suits should not be construed as "representative actions" within the meaning of Rule

23 because lawsuits filed by the EEOC serve "to vindicate the public interest in preventing employment discrimination." *Id.*[23]

The ability of executive agencies such as the EEOC to vindicate the right of those protected by statute is nothing more than a fulfillment of the executive branch's constitutional obligation to enforce Congress' laws. No such constitutional obligation to police the law is imposed upon labor unions. And while labor unions may be the statutory representative of their members for collective bargaining purposes under the LMRA, they are neither accountable nor responsible to any branch of the government, as are the executive administrative agencies.

If it is at all germane here, *General Telephone* raises probing questions about whether Congress, if it truly had intended for unions to assume the responsibility for back-pay litigation under WARN, could authorize the conduct of such "representative actions" without requiring notice to the employees and affording them the right to decline participation. *See Telecommunications Research*, 806 F.2d at 1097-98 (Bork, J., concurring) (associational standing creates Rule 23 problems); Note, "Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny," 61 Bost. U. L. Rev. 174 (1981). Unless the employees are given notice and afforded a chance to opt out as mandated by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the employer has no assurance that any disposition or settlement of the WARN claim will preclude further litigation by employees under principles of res judicata. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dism'd as improvidently granted*, 114 S. Ct. 1359 (1994).[24]

[23] For the same reason, the *dictum* in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 115 S.Ct. 1278, 1286 (1995), suggesting that "Congress *could* have conferred standing upon the Director without infringing Article III" does not further petitioner's cause.

[24] Amici's invocation of Rule 23 to justify the Union's position here ignores these principles and disregards the fact that many class actions are certified as such only on the issue of liability.

Furthermore, a union, for its own political purposes, may launch a suit on behalf of its members which is not favored or even approved by those members. *See Brock*, 477 U.S. at 297 ("a union may have reasons for instituting a suit — such as the publicity that attends a major case — other than to assert rights of its members") (Powell, J., dissenting). Indeed, these concerns are present here because after the dismissal of this action allegedly brought on behalf of 277 union members, an individual action was commenced, but only by 142 of those persons. One could surmise that approximately one-half of the plant workers may not have wanted the Union to undertake a crusade on their behalf but were given no right or opportunity to express their views before the Union embarked upon this lawsuit.

At any rate, there is a wide chasm between the present situation and the authorization of a federal agency to litigate to enforce the statutory scheme it is charged with administering and enforcing.

C. Cases Involving Traditional "Representatives" Do Not Support the Union's Standing.

Petitioner's Point II espouses the theory that the existence of various traditional "representative" plaintiffs, whose Article III standing has never been examined, justifies its standing here even in the absence of "personal" injury to it. The Union acknowledges that its theory would rewrite *all* of this Court's modern standing cases (Br. 37). For example, in *Simon*, 426 U.S. at 39, the Court rejected this very proposition:

> "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement."

In *Lujan*, too, the Court reemphasized that part of the "irreducible constitutional minimum of standing" is the requirement "that the party seeking review be himself among the injured." 504 U.S. at 560, 563.

Properly read, the "representative" cases are entirely (or at least almost always) consistent with existing Article III doctrine. The would-be representative is situated so that it satisfies Article III, including the "personal" injury requirement, for itself. The Union is simply not equivalent to any of these "traditional" representatives.

Petitioner invokes the *Wright & Miller* treatise for the proposition that "representative" actions are commonplace and that, by analogy, a union can assert damage claims for its members (Br. 36). In a lengthy footnote (*id.* at 36-37 n.9), petitioner cites numerous cases involving trustees, executors, guardians, receivers, administrators, etc., most of which did not even discuss standing.[25] The difference between those cases and the present one is fundamental and determinative: trustees, receivers, executors and administrators have title to the property or assets in question and, by definition, have a personal legal interest at stake. It is therefore fully consistent with the requirement of "personal injury" that they have the right to conduct litigation aimed at increasing the worth of that property and to defend actions designed to impair its value. Scott, *The Law of Trusts* §2.6 (4th ed. 1987). Here, there is no estate or property that the Union owns or is charged with protecting.

Cases involving guardians usually are predicated on a judicial determination that the ward is not capable of carrying on his or her own affairs, including the conduct or the defense of litigation, and that a "next friend" should be appointed. Indeed, even in capital cases the Court has ruled that a "next-friend" does not have standing to assert the rights of a condemned prisoner unless he provides "an adequate explanation — such as inaccessibility,

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[25] For the same reason, to the extent petitioner seeks to derive some precedential support from the fact that this Court entertained *North Star Steel Co. v. Thomas*, 115 S. Ct. 1927 (1995), on the merits, the short answer is that the union's standing was never briefed, argued or decided in *North Star*. Significant constitutional rulings are not made by default.

mental incompetence, or other disability — why the real party in interest cannot appear on his own behalf to prosecute the action." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). The Union here can make no such showing. The union members are hale and healthy, and those who are interested have filed their own actions as "person(s) . . . aggrieved under paragraph (1)" of §2104(a).

Finally, each of the "representative" capacities to which petitioner would compare itself almost always involves the "representative" of a single individual or a small group — a beneficiary, a ward, or the like. None of the categories cited by the Union deal with a "representative" of a large group (say, 277) seeking individualized damages.

Petitioner's reliance on *Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900), is curious. There, the Court dismissed a proceeding brought by a putative representative under state law, even though his standing was not contested in the state system. While *Tyler* pre-dated modern notions of standing, the Court invoked the now-familiar requirements that a plaintiff "must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens," and that "[a] plaintiff cannot properly sue for wrongs that do not affect him." *Id.* at 407.

Petitioner further seeks analogous comfort in the trustee cases by pointing out that "in these instances, the representative typically has some concomitant legal duty to forward the interests of the party being represented" (Br. 41). To the extent that the Union is implying that it has a "duty" to pursue WARN cases on behalf of its members, it contradicts the correct statement to the contrary made at page 17, footnote 4 of its brief. There is nothing in WARN that imposes *any* duties on the employee representative, let alone requires it to take up the litigation mantle on behalf of affected plant workers. Those workers, after all, are given the right to sue in their own behalf if they so choose.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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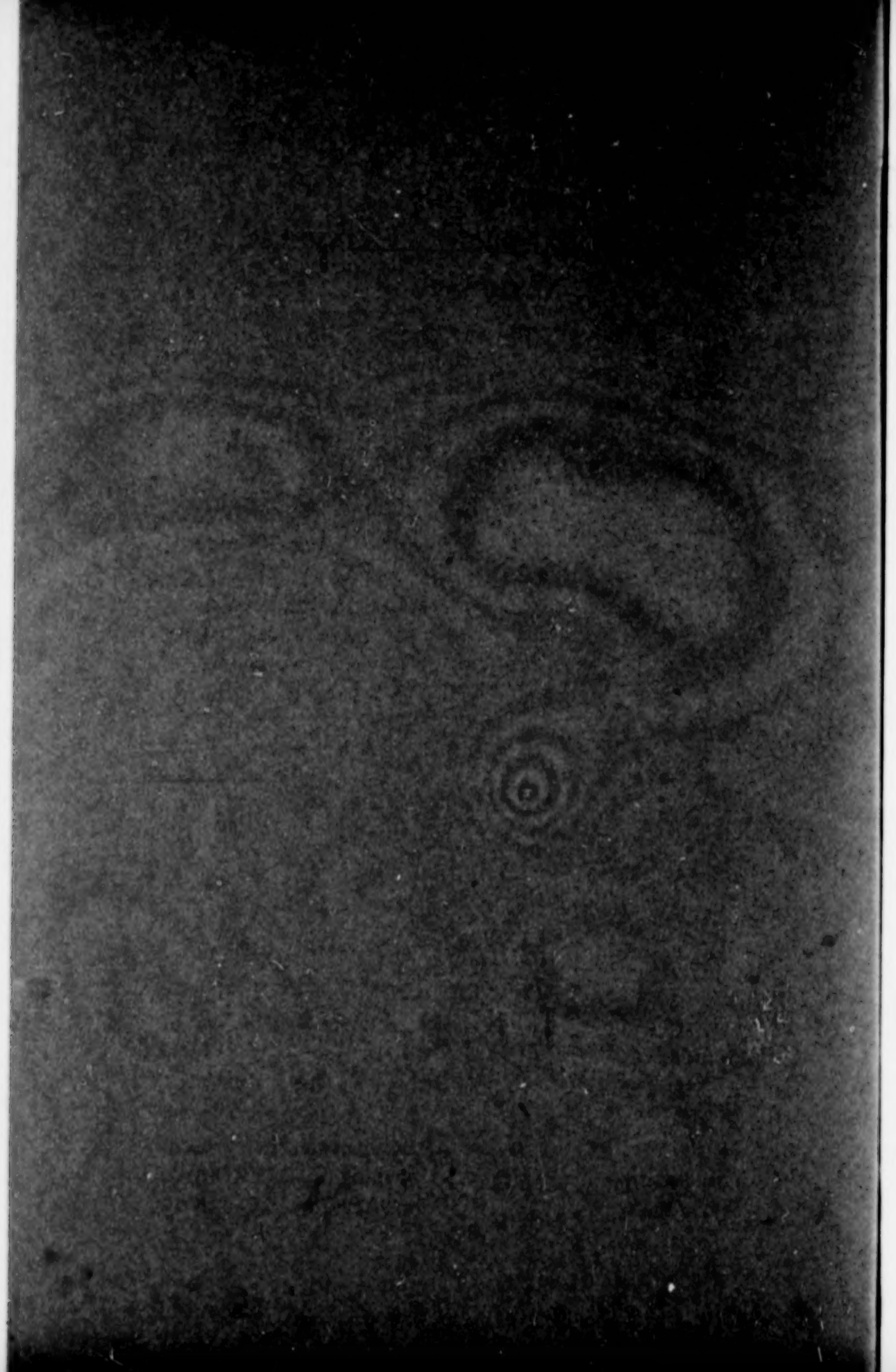
ADDENDUM



ADDENDUM

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE III

THE JUDICIAL DEPARTMENT

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . .

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATUTORY PROVISIONS INVOLVED

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT, Title 29, U.S.C.

§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions. As used in this Act . . .

(4) the term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act (29 U.S.C. 159(a),

158(f)) or section 2 of the Railway Labor Act (45 U.S.C. 152);

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer.

§ 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, state dislocated worker units, and local governments. An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order —

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act and the chief elected official of the unit of local government within which such closing or layoff is to occur.

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers. (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —

(A) back pay for each day of violation at a rate of compensation not less than the higher of —

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

* * *

(3) any employer who violates the provisions of section 3 with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation . . . .

* * *

(5) a person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(b) Exclusivity of remedies. The remedies provided for in this section shall be the exclusive remedies for any violation of this Act. Under this Act, a Federal court shall not have authority to enjoin a plant closing or mass layoff. (Aug. 4, 1988, P. L. 100-379, 102 Stat. 893.)

FOR ARGUMENT

(10)

Supreme Court, U.S.
FILED
FEB 13 1996
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No. 95-340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 751,
Petitioner,
v.
BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

**On a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Brown Shoe's threshold argument is that Congress did not, in the WARN Act, provide that labor organizations meeting the statutory definition of "representative" may bring a suit such as this one. That Congress did so provide could not be more clear.

A. WARN § 2104(a)(5) provides expressly that on a violation of the Act's notice requirements, among those persons who may sue "seeking to enforce [the resulting statutory] liability" are a "representative of employees or a unit of local government aggrieved under paragraph (1) or (3)." Section 2104(a)(1), in turn, provides for a monetary payment to each "aggrieved employee" in the event of noncompliance with the notice provisions. "Representative" is then defined elsewhere in the statute as "an exclusive representative of employees." § 2102(a)(4). "Aggrieved employee" is also a defined term—"an employee who . . . , as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title." § 2104(a)(7).

The pertinent language of § 2104(a)(5), then, in terms, authorizes a "representative", as defined by the statute, of "employees . . . aggrieved", as defined by the statute, to sue for "such liability" as the statute provides those employees when their employer does not properly notify their representative of a plant closing or mass layoff.

Brown Shoe, however, maintains that § 2104(a)(5) does not mean what it so plainly says on its face. According to respondent, the word "aggrieved" in § 2104(a)(5) is intended to modify not "employees" in the phrase "representative of employees" but "representative", and "a union as the statutory 'representative of employees' is not 'aggrieved under paragraph (1) . . .'" Brief for Respondent (Resp. Br.) at 11. But § 2104(a)(5) does not depend gramatically upon the *representative* being one of the persons § 2104(a)(1) denominates as

"aggrieved" and on that account entitled to the statutory liability established there. Rather, it is sufficient, as recounted above, that the union be the "representative" of "*employees* . . . aggrieved." That Brown Shoe chooses in its brief to italicize the entire § 2104(a)(5) phrase in question *except* "of employees" (Resp. Br. at 11) before proceeding with its analysis of the critical statutory language demonstrates that its interpretation does not grammatically account for those two words but, instead, proceeds as if those words were not part of the text.

Indeed, since there is no WARN Act lawsuit that a "representative of employees," could file other than one for employee monetary relief,[1] Brown Shoe's construction would render a complete nullity not only the term "of employees" in § 2104(a)(5), but the longer phrase "including a representative of employees . . . aggrieved" as well, in violation of long-established principles of statutory construction. *Astoria Fed. Sav. & Loan Ass'n v. Solomino*, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible so as to avoid rendering superfluous any parts thereof"). The half-hearted suggestion made to meet this abnegation of express statutory language—that the "reference to a 'representative' . . . contemplated the maintenance of class actions" (Resp. Br. at 13 n.5)—does not fill the gap. Congress was, as noted, careful in the WARN Act to give us the precise meaning of "representative" "[a]s used in this chapter" (§ 2101(a)(4))—and that meaning is *not* that the "representative" is *a class action* representative.[2]

The WARN Act's language and structure, consequently, lead inescapably to the conclusion that Congress meant

[1] The WARN Act expressly precludes remedies other than those spelled out. 29 U.S.C. § 2104(b).

[2] Brown Shoe's suggestion as to the role of the term "representative" is inconsistent as well with the structure of the remainder of § 2104(a)(5). That section goes on to provide for suits on behalf of "such person or . . . other persons similarly situated." There is, of course, no point in providing twice for class litigation in a single provision.

to permit exclusive representatives to file suit to enforce the statutory liability for monetary payments to individual employees in the event of employer non-compliance with the statute's notification requirement.[3]

Once Brown Shoe's manifest misreading of the statutory language is exposed, respondent's arguments about the anomalies supposedly created by a common sense reading of that language collapse. The statute is comfortably read sequentially, so that the "representative of employees . . . aggrieved" can sue for the liability due those employees (under § 2104(a)(1)), while "a unit of local government aggrieved" can sue for the penalties due that unit (under § 2104(a)(3)). And, to the objection that the class action language does not make sense as applied to suits by representatives (Resp. Br. at 12), the obvious answer is that the language was not intended to cover such suits but other suits, by individually aggrieved employees. The statute does not *require* that cases be brought for others similarly situated, and the statute therefore makes perfect sense by applying the class action language to employee suits and not to representative suits.

B. Nor is it true—even if it were relevant—that the provision for suits by representatives as defined in the WARN Act "was not a conscious appointment of a union as vindicator of its members' rights but rather a mere remnant of the previous proposal in which the union was actually afforded its own rights and remedy." Resp. Br.

[3] It was obvious to those concerned with the passage of the WARN Act that unions could file suit for monetary relief payable to employees. This awareness is perhaps best illustrated by the fact that in the 1987 hearings on the bill, the NAM's representative complained not that unions could sue but that employees could also sue. *See* Hearings before the Subcommittees on Labor-Management Relations and Employment Opportunities on H.R. 1122, 100th Cong., 2d Sess. (Mar. 17, 1987) ("Hearing") at 119 (remarks of J. Bruce Johnson on behalf of the National Association of Manufacturers) ("the bill leaves open the possibility that suits may be brought by employees . . . even if unions or other employee representatives do not sue.")

at 14. The evolution of the statutory provisions confirms, instead, that from an early point in the statute's evolution Congress specifically intended to permit statutory representatives to bring suit for the statutory monetary payments due to individual employees under § 2104(a)(1).

So far as we can tell, the present WARN § 2104(a)(5) began life in 1985, as the second sentence of what is now § 2104(a)(1), worded so that the section read:

> Any employer who orders a plant closing or mass layoff in violation or this Act . . . shall be liable to each employee who suffers an employment loss as a result of such closing or layoff for reinstatement or damages, or both. A person seeking to enforce such liability (including a representative of employees) may sue for himself or for other persons similiary situated, or both in any district court of the United States in which the violation is alleged to have occurred or in which the employer transacts business. [H.R. 1616 § 6(c), 99th Cong. 1st Sess., as introduced March 20, 1985.]

See also H.R. 1616 § 7(b), as reported to the House of Representatives (October 29, 1985) (same language); H.R. Rep. No. 99-336, 99th Cong. 1st Sess. (1985) at 24 (summarizing the enforcement provision quoted above);[4] Substitute for H.R. 1616, 131 Cong. Rec. H 10213 (Nov. 14, 1985) § 7(a)(1) (same language, execpt that "reinstatement" no longer appears and suit can be filed only for "back pay and related benefits for each day of such

[4] The House Report refutes Brown Shoe's insistence that the provisions regarding who may file suit are essentially venue provisions. Resp. Br. at 12. The Report after stating the statutory liability to each employee, states:

> A person (including an employee representative) seeking to enforce such liability may sue either for himself or for other persons similarly situated. Suits may be brought in federal district court for any district in which the violation is alleged to have occurred . . . . [*Id.* at 24]

This paraphrase, by summarizing in separate sentences the standing and venue aspects of the paragraph, makes clear that the provision is more than simply a venue provision.

violation, not to exceed a total of 90 days.") Under this language, it was crystal clear that the "such liability" for which an exclusive representative could bring suit was precisely the liability for monetary payments to individual employees for employer failure to comply with the statute.

After H.R. 1616 failed (*see* Brief for Petitioner (Pet. Br.) at 20), new bills were introduced in the next Congress. Those bills were drafted to be more specific about the nature of the monetary relief available to individual employees, with the result that as now, that relief was described in detail in separate, numbered subparagraphs. Presumably as a result of this growing complexity, the provision regarding authority to bring suit for that relief was moved in the House bill into a separate, immediately following subsection (H.R. 1122 (100th Cong. 1st Sess. Feb. 18, 1987) §§ 355(a)(1) and (2)), and additional subsections (b)(1) and (2) were added providing for liability to units of local government ((1)) and for enforcement of that liability ((2)). In the Senate bill, the provision regarding liability for failure to fulfill statutory obligations to units of local governments became (a)(2), and a new, catchall enforcement section became (a)(3).[5] S. 538 (100th Cong. 1st Sess. Feb. 19, 1987). In both instances, the term "such liability" was retained, and in neither instance was there any monetary relief running to the representative itself, rather than to individual employees and to units of government. Thus, it is apparent that no pertinent change from the 1985 versions was intended; rather, the minor alterations in the enforcement section resulted from the need to take structural account of the other statutory changes, not here pertinent.

In the Senate committee, further changes were made in the enforcement provision, but of the same housekeeping character: That committee added a statutory monetary

[5] That section read:

> A person seeking to enforce such liability (including a representative of employees (or a unit of local government) may sue either for himself or for other persons similarly situated, or both, in any district court of the United States . . . [sic].

penalty for failure to provide information on request to the "representative of the affected employees" or the "unit of local government" (S. 538 as reported, 100th Cong. 1st Sess. 1987, §§ 333, 334(a)(3)), and some clarifying provisions regarding liability in its subsections (4) and (5). The enforcement language therefore was moved to subsection (6), and was drafted to read:

> A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1), (2), or (3), may sue either for such person or for other persons similarly situated . . .

Brown Shoe would have it that the intent of this language was to permit unions to sue *only* for violations of (3), the provision for monetary relief for failure to provide requested information. But, as shown above, the express authorization for statutory representatives to file suit was in the legislation *before* there was any monetary relief accorded to such representatives, and was from the outset directly linked to the liability for monetary relief to individual employees. Further, even taken in isolation, Brown Shoe's explanation of the Senate committee enforcement language won't wash: That language *includes* subsection (1), the liability to individual employee subsection, among those on which "a representative of employees . . . aggrieved" may sue. And, the inclusion of subsection (1) would, contrary to statutory interpretation rules, have no function under Brown Shoe's explanation.[6]

The Conference report followed, with regard to enforcement, the basic scheme of the Senate bill. But, since the bill no longer contained the section requiring that information be provided and therefore provided no relief

[6] The House committee did not add a statutory penalty for failure to provide information, and left the enforcement provision authorizing suits by a "representative of employees" where it had been in the House bill as introduced—immediately after, and pertaining only to, the section establishing liability for monetary relief to individual employees; separate subsections provided for penalties payable to and enforcement by units of local government. H.R. Rep. No. 100-285 (100th Cong., 1st Sess. 1987), at 46-47.

to anyone for failure to provide information, the reference to such relief in the enforcement provision was deleted. H.R. Conf. Rep. No. 100-576, 100th Cong. 2d Sess. at 463-64. Thus, the Conference version (which remained in the final bill after a veto and a separate reenactment of the WARN Act) was with respect to court enforcement basically a reprise of the Senate bill as introduced in 1987, which in turn was simply the second sentence of the original employee monetary relief section moved and expanded as a result of growing statutory complexity. The evolution of § 2104(a)(5), in short, makes clear that Congress specifically contemplated lawsuits like this one under the WARN Act, and expressed that intent consistently in the evolving statutory language.

2. Brown Shoe repeats the same error in its assertion that Congress' reference to union enforcement in § 2104(a)(5) was simply a mistake by maintaining that "the statute gave a union no right . . . concerning a notice." Resp. Br. at 14.[7] The Act in terms provides that before an employer orders a plant closing order, the employer must

[7] While Brown Shoe suggests that any injury to the union was inadequately pleaded here, the complaint tracks the statutory provisions as Congress wrote those provisions: The caption, specifying that UFCW Local 751 is suing "as representative of the aggrieved employees" (Jt. App. 7), closely paraphrases § 2104(a)(5). The complaint goes on to allege that the plaintiff is an "employee representative as defined by . . . the Act", and that "[t]he notice to William R. Treece was not in compliance with § 2102(a)(1) because William R. Treece is not the exclusive representative of the affected employees," as well as because the notice was untimely. Jt. App. 8, 9. The relief sought includes payment of backpay and benefits to each of the aggrieved employees, as the statute mandates. Jt. App. at 9-10.

In other words, the complaint alleges that Brown Shoe was supposed, under the statute, to provide statutory notice to the union but did not, and as a result the employer owes back pay and benefits under the Act to the employees the union represents. If, as we maintain, Congress was entitled to enact the statutory scheme these pleadings invoke, nothing in Article III of the Constitution requires

provide "written notice of such an order . . . to each representative of the affected employees." 29 U.S.C. § 2101(a). Notwithstanding these plain words, Brown Shoe insists that Congress "created the statutory notice requirement primarily for the benefit of non-union workers," and provided for notice to the statutory representative simply for the convenience of employers whose employees were organized. Resp. Br. at 14-15.[8]

A. With a statute this clear, it hardly matters *why* Congress chose to provide that the union representing employees, if there is one, must be notified of a plant closing, any more than it mattered in *Havens Realty Corp., supra, why* Congress chose to mandate that accurate information regarding the availability of real estate be provided even to individuals who have no need of that information because they are not in fact seeking to

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more precise pleading. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982) (the Article III requirement of injury in fact is satisfied by pleading "the denial of the [plaintiff's] own statutory right to truthful information;" facts in addition to the denial of a statutory right are necessary only if a party is seeking to rely on another individual's statutory rights, and must therefore plead facts demonstrating its own injury).

[8] Once again, Brown Shoe's argument here is at odds with the views of the NAM representative during the legislative consideration of the WARN Act. At that time the complaint was that "some of the largest unions . . . are . . . leaders in this effort to require mandated notification of plaint shutdown and layoffs" in an attempt to "expand their benefits through legislation . . . as proposed here" and thereby "concentrate all of their collective bargaining muscle on even higher wage demands . . . with the knowledge that Congress will provide the rest of the benefit package." Hearing, *supra*, at 92 (remarks of J. Bruce Johnson on behalf of the National Association of Manufacturers).

In any event, the fact that Congress in discussing a legislative proposal focusses on an application narrower than the range of applications the statute's actual language covers does not thereby narrow the statute's reach. "This Court has never required that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 498 U.S. 103, 111 (1990).

rent or buy. Whatever Congress' purpose, where, as here, a statute provides that certain information is to be provided to specified individuals or entities, that statute thereby "in terms, establishes an enforceable right to truthful information;" where the requisite information is not so provided, the designated individual or entity "has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing . . ." 455 U.S. at 373-74.[9]

Brown Shoe seeks to avoid the clear holding of *Havens Realty* on the flimsy notion that in *Havens Realty* the statute declared it "unlawful" to refuse to provide the requite information. Resp. Br. at 19. In other words, according to Brown Shoe, the outcome of this case would be different if, instead of mandating that "An employer shall not order a plant closing" without providing the requisite notice "to each representative of the affected employees" (29 U.S.C. § 2102(a)), Congress had provided that "It shall be unlawful for an employer to order a plant closing" without providing that same notice. Nothing in *Havens Realty* indicates that this Court's standing holding in that case turned on such linguistic ephemera.

B. In any event, Congress did have cogent reasons, quite aside from mere convenience to employers, for providing that the notice obligation runs to unions and not merely to each employee in an organized plant. The Act's principal authors summarized those reasons in

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[9] Federal statutes providing that certain individuals by virtue of their status or actions are entitled to mandated information and permitting those individuals to enforce the obligation to provide the information, without any showing of injury other than the failure to receive the mandated information, are common. *See, e.g.*, Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973) (right to maintain suit to compel disclosure under FOIA is not dependent "upon the interest or lack of interest of a party seeking disclosure"); Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq. *White v. Arlen Realty Development Corp.*, 540 F.2d 645, 649 (4th Cir. 1975) ("injury in fact" is satisfied under TILA by failure to receive information Congress required be disclosed).

a letter to the Secretary of Labor with regard to the Secretary's suggestion, in an early post-Act policy statement, that "the notice should be served on the closest or most direct representative of the affected employees (i.e. the local union(s)." *Worker Adjustment and Retraining Notification Act: Solicitation of Comments in Advance of Proposed or Interim Final Rulemaking: Discussion Paper*, 53 Fed. Reg. 43733 (October 28, 1988). The Act's authors objected that while it is desirable that local unions be notified as well, "the statute *requires* that the exclusive representative of the employees receive notice," for "a clear policy reason":

> As the collective bargaining agent, the exclusive representative, whether it be an international union, a regional union council or a local union, has the responsibility and authority to address changes in terms and conditions of employment, the effects of a plant closing or mass layoff, and cooperative efforts at worker readjustment. [Congressional Sponsors Joint Letter to U.S. Department of Labor, November 10, 1988, at 8, *reprinted* in Committee on Education and Labor, U.S. House of Representatives, *Legislative History of S.2527, 100th Congress, Worker Adjustment & Retraining Notification Act* (1990) ("*Leg. Hist.*") at 114.]

See also Brief for Petitioner (Pet. Br.) at 18 (summarizing similar statements during the legislative process); Brief for the United States as Amicus Curiae Supporting Petitioner at 15 (same); Preamble to Final Department of Labor Regulations, 54 Fed.Reg. 16042 (April 20, 1989) ("[T]he purpose of providing notice to the parties mentioned in the Act is to allow each of them to take responsible action.")

Moreover, the Department of Labor—expressly required by the Act to promulgate "interpretive regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter" (29 U.S.C. § 2107(a))—quite emphatically rejected the contention in crafting those regulations that

"the Union's only role under WARN . . . is to serve as the conduit to the affected employees for notice from the employer." Resp. Br. at 17. The final Department of Labor regulations do not adopt the Department's initial suggestion that notice be provided to the local union, but instead provide for notice to the exclusive representative, with only the recommendation that notice be given to local union officials as well if the local union is not the representative.[10] 20 C.F.R. § 639.6; 53 Fed. Reg. 49065 (December 5, 1988). Those regulations also specify somewhat different requirements for the content of notices to exclusive representatives and to individual employees (20 C.F.R. § 639.7(c) and (d)), "designed to provide information necessary for each of them to take responsible action." Preamble to Final WARN Regulations ("Preamble"), 54 Fed. Reg. 16059 (April 20, 1989). And, in response to suggestions made during the regulatory comment period that the regulations mandate notice to individual employees where there is an exclusive representative, the Department concluded that requiring either the employer or the union to provide such notice would be inappropriate:

> [A] commenter suggested that non-members of a union should receive individual notice. . . . WARN provides that, where there is a representative of affected employees as of the time of notice, an employer must provide notice to that representative rather than directly to the workers. Thus, [this] suggestion would not be appropriate. . . .
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> A commenter suggested that the regulations should provide that a union must give notice to the affected employees it represents within 3-5 days and that a penalty should be imposed upon the union for failure to give notice. WARN contains no provisions imposing any notice obligations on unions. The sugges-

[10] Had the notice to the union been intended merely as an efficient way to transmit notice to the employees individually, notice to local unions, without regard to their status as exclusive representative, would have sufficed.

tion cannot, therefore, be adopted. [Preamble, *supra*, at 46.]

C. In short, Congress provided exclusive representatives with a statutory right to notice *and* a statutory right to sue precisely because the exclusive representative *is*, when it comes to a plant closing, a party whose legal status and legal rights and interests as the employees' representative for workplace matters are directly, immediately, and adversely affected. For that reason, among others, respondents' invocation of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)—the only case in this Court striking down a Congressional enactment as beyond Congress' powers under Article III—is unavailing. *See* Pet. Br. at 29-30.

Lujan involved a statute requiring consultation between various governmental agencies, and authorizing "any person" to sue for violation of that requirement. 504 U.S. at 572. The Court noted that it has

> consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and law, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. [504 U.S. at 573-74.]

Viewing the question before it as "whether the public interest in the proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such," (504 U.S. at 576), the Court concluded that Congress may not effect such a conversion:

> If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that

> the Laws be faithfully executed," Art. II, § 3. . . . We have always rejected that vision of our role[.] [504 U.S. at 577.]

The standing question raised by the *Lujan* statute is far afield from the standing question raised by the WARN Act here. In the first place, the WARN Act generates none of the concerns about shifting responsibility for the enforcement of the laws from the Executive Branch to the Judicial Branch that underlay *Lujan*. Here, as in *Havens Realty*, Congress' sole concern was forging a cause of action to enforce a federal statutory right between private parties, in a context in which there is no public law enforcement role whatever.[11] In this statutory context, involving the authority of Congress to define private rights and private causes of action to vindicate those rights, the Legislature's power is at its zenith.

Consequenty, this Court's standing jurisprudence, as *Havens Realty* illustrates, is that the only pertinent Article III concern here is whether the resulting WARN Act case is presented "in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 93-94 (1968).[12] Any greater standing limitation on Congress'

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[11] The Court's plurality opinion in *Lujan* specifically noted that its holding may have no application beyond "suits against the government" (504 U.S. at 578), while a concurring opinion characterized the Court's holding as defining only an "outer limit to the power of Congress to confer rights of action," leaving that power fundamentally intact. 504 U.S. at 580 (Kennedy, J., concurring). The concurring opinion, in particular, emphasized that:

> Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Courts opinion to state a contrary view. [504 U.S. at 580 (Kennedy, J., concurring).]

[12] Our point in emphasizing that this case (like *Havens Realty*) is distinct from the main stream of the Court's standing cases because this is a case between two private parties, is *not* that, as a result, Congress' actions do not generate any separation of powers concerns. Rather, our point is that those concerns are

Article I powers in this regard would raise separation of powers issues of its own, by asserting an extraordinary judicial authority to negate Congress' considered views concerning the distribution of rights and obligations among private parties.

This case also differs fundamentally from *Lujan* in that the WARN Act does not create a general cause of action to sue over a "generally available grievance" concerning compliance with the laws. As the concurring *Lujan* Justices pointed out, the *Lujan* statute simply conferred a right of action that "[did] not of its own force establish that there is an injury in 'any person' . . ." 504 U.S. at 580 (Kennedy, J., concurring). Here, in contrast, the statute first provides that notice is due *from the employer to the employees' exclusive representative* (not to the public at large or, as in *Lujan*, to some governmental entity), and only then authorizes *that* representative to sue where the employer does not provide the notice. Moreover, the union to whom notice is due necessarily has had previous direct involvement in the affairs of the plant in question through its statutory responsibility for representing the workers in the plant, a role which will necessarily be affected by the plant closing or mass layoff.

For these reasons, the union is no mere concerned bystander attempting to vindicate the public interest, or an interest the union shares in common with the public at large. Thus, the concerns evinced in *Lujan* regarding litigation over claimed injuries felt equally by all mem-

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qualitatively diffeernt—and quantatively less—than where Congress authorizes judicial challenges to governmental action.

That cases finding a lack of Article III standing in disputes that do not challenge governmental action are rare is perhaps best indicated by the fact that Brown Shoe does not cite any such cases, and alters the sense of the primary case that is cited by substituting ellipses for the phrase that makes clear that concerns about challenges to governmental authority *are* central in standing cases. Resp. Br. at 30; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (emphasis supplied) ("The power to declare the rights of individuals *and to measure the authority of governments*, this Court said 90 years ago, 'is legitimate only as a last resort . . .'")

bers of the public have no application. Put another way, the statute involved in *Lujan* would have been parallel to the one in this case only if that statute had provided for consultation with specified, ascertainable persons or groups with an established, statutorily-mandated involvement in the preservation of endangered species, and then authorized those persons or groups to sue if they were not so consulted. Nothing in either the *Lujan* plurality opinion or Justice Kennedy's concurring *Lujan* opinion suggests that there is any constitutional question as to the validity of that kind of hypothetical statute.

3. As to the "redressibility" question, we noted in our opening brief that where a duty flows to one person at least in part to aid that person in forwarding the interests of certain individuals, providing monetary relief to the benefitted individuals on a suit by that person to redress a breach by the defendant of that duty appropriately redresses the plaintiff's legal injury. Pet. Br. at 32.

Brown Shoe objects that none of the three examples we provided to illustrate this point are precisely like the WARN Act. Resp. Br. at 34-35, 40-42. But we are not, of course, contending, that this case *is* a Labor Managements Relations Act § 301 case like *International Union UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), or a third party beneficiary case, or a case in which the government is suing to protect the public interest.

Rather, our point is that in each of these analogous circumstances, as here, a recognized, separate legal interest, albeit one related to forwarding the welfare of other individuals, is vindicated by providing appropriate monetary relief to those individuals. Pet. Br. at 35. That the source of the legal interest is different from that here—contractual, in LMRA § 301 and third-party beneficiary cases, and grounded in governmental authority and statutory authorization in statutes such as Title VII, the FLSA and ERISA granting governmental entities the right to sue to advance the public interest—has no

bearing upon whether remedial schemes of this general structure somehow run afoul of Article III.[13]

Brown Shoe misunderstands, in particular, the pertinence of the third-party beneficiary cases to this case. In those cases, the promisee has traditionally been permitted to enforce its legally-recognized interest in performance of a promise made to the promisee through a suit ordering the promisor to pay money to the third-party beneficiary, even if the relief granted in the lawsuit will provide no direct benefit to the plaintiff. *See, e.g., Drewen v. Bank of Manhattan Co. of City of New York*, 155 A. 2d 529 (N.J. Sup. Ct. 1959), and case cited *id.*, at 533 (seventeenth century English case holding that where A has promised B that A will pay a specified sum of money to C but does not do so, B's administrator can sue for performance of that promise even though B's estate " 'should receive no benefit if he did recover' "); *Croker v. New York Trust Co.*, 156 N.E. 81, 82 (N.Y. 1927) (where A promises B to pay money to C and D, B can sue "to enforce the liability of the promisor to the third party beneficiaries;" although "the promisee has suffered no pecuniary damage by the failure of the promisee to perform [and] [h]is injury at law is, therefore, purely technical", the promisee nonetheless "is interested in asserting the duty of the promisor to carry out the terms of the contract"); *Blair v. Southern Clay Mfg. Co.*, 121 S.W. 2d 570, 571 (Tenn. 1938) (while a third party beneficiary can sue for enforcement of a promise to pay money to him, "[t]he better practice . . . is a suit by [the promisee] to enforce the obligation for the use of C"). Such cases, then, are "in a form historically viewed as capable of resolution through

[13] As the Court recognized in *Lujan, supra*, the redressibility prong of the Article III standing doctrine has to be applied flexibly, taking into account the nature of the legal right being enforced. For example, "[a] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressibility and immediacy." 504 U.S. at 572 n.7.

the judicial process" (*Flast v. Cohen, supra*, 392 U.S. at 93-94), and are directly relevant to the Article III analysis here for that reason.[14]

4. Finally, Brown Shoe maintains that *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and related cases, preclude Congress from expressly permitting the union as a statutorily-designated representative of employees to bring suit seeking individual monetary relief for those employees.

Since the plaintiff union is both the holder of the legal right the defendant employer is alleged to have violated here and an authorized litigant to vindicate that right, neither *Hunt* nor *International Union, UAW, supra*, nor *Warth v. Seldin*, 422 U.S. 490 (1975)—all of which involve situations in which the Congressional or statutory

[14] It is, moreover, difficult to understand Brown Shoe's remark that another set of analogous cases, those involving government suits to enforce the public interest which result in payment of monetary relief to each of a group of individuals, suggest that Congress did not intend to permit unions to bring backpay suits under WARN because "the employer has no assurance that any disposition of the WARN claim will preclude further litigation by employees. . . .". Resp. Br. at 42.

The governmental suits certainly do *not* establish any principle that Congress may not provide a party with a legally-cognizable interest in the welfare of certain individuals, a cause of action to recover monetary relief for the latter without requiring in that statute notice to the individuals and without affording them the right to decline participation. To the contrary, *General Telephone Co. v. E.E.O.C.*, 446 U.S. 318, 333 (1980), specifically *declined* to impose those requirements while observing that "[t]he courts are not powerless to prevent undue hardship to the defendant and should perform accordingly" by, *inter alia*, precluding double recovery and requiring any individual who claims under a judgment or settlement to relinquish the right to bring a second suit. *See also International Union UAW v. Brock*, 477 U.S. 274, 290 (1986).

Indeed, if each of the employees proceeds individually, as employees may under the WARN Act, the employer is surely much more likely to face a multiplicity of suits than where the union sues for monetary relief for all represented employees.

obligation enforced ran to individuals rather than to the organization bringing suit—are on point.[15]

Moreover, even without regard to that critical difference in the nature of the legal right enforced, the "associational standing" cases are not informative here. None of those cases confronted or resolved the question whether Article III, as opposed to prudential considerations, requires a distinction between injunctive relief and the kind of narrowly specified monetary relief the WARN Act provides.[16]

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[15] We are puzzled by Brown Shoe's suggestion that the Question Presented in the Petition does not encompass the issue whether the third prong of *Hunt*, precluding associational standing where individualized relief is sought, is prudential in the sense that a Congressional authorization of such relief can be sufficient to satisfy Article III. Associational standing is simply a subcategory of representational standing, as this Court's cases recognize. *See, e.g., Warth, supra*, 422 U.S. at 511 (if the requisite criteria are met, an "association may be an appropriate *representative* of its members" (emphasis supplied)); *Hunt, supra*, 432 U.S. at 345 (because it meets the requisite standards, "the Commission has standing to bring this action in a representational capacity.") Since the Question Presented asks whether Article III precludes Congress from permitting the plaintiff union from suing as the representative of affected employees (Pet. Br. at (i)), that question encompasses representational standing theories generally, including a theory premised, like *Hunt*, on an analogy to associational standing. *See* Petition for Writ of Certiorari at 14-20 (discussing *Hunt* and prudential standing considerations at length).

[16] The relief sought here, moreover, is *not* the type of *individualized* damages relief involved, for example, in *Warth*. 422 U.S. at 515 (organization of home builders may not recover for business opportunities and profits lost by individual builders). Rather, the relief in a WARN Act case will almost always be figured from the payroll records of the defendant employer exclusively, with no need for individual testimony by affected employees. (The only exception would occur if the exclusive representative attempts to recover under § 2104(a)(1)(B) for medical expenses incurred during an employment loss; the *Warth* line of cases, even if applicable, would then require only that the particular employees for whom such relief is sought be joined in the suit.)

Respondent insists, nonetheless, that the dicta in *Hunt* to the effect that voluntary associations cannot bring suit where "the relief requested requires the participation of individual members in the lawsuit" (432 U.S. at 343) is constitutionally-based, because of "the redressibility problem posed by associational damage suits." Resp. Br. at 38.[17] *Warth*, the case from which the *Hunt* criteria were derived, however, only goes so far as to state that the first of the three "associational standing" criteria—that the individual members fulfill the bedrock injury-in-fact Article III requirement—is constitutionally mandated. *Warth*, 422 U.S. at 511 (because "[t]he possibility of representational standing . . . does not eliminate the constitutional requirement of a case or controversy," an association, in order to represent its members, "must allege that its members or any one of them are suffering immediate or threatened injury as a result of the challenged action.")

The concern articulated in *Warth* as underlying the individualized relief prong, in contrast—whether "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured," (422 U.S. at 515)—is a sensible prudential concern that, absent a Congressional or other legislative or traditional determination that a designated representative *can* seek monetary relief flowing to specified individuals, there will be grave difficulty in deter-

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[17] *Hunt* was not a suit seeking individual monetary relief. Moreover, while *Hunt* did involve a state agency entrusted with advancing the interests of a designated group of individuals rather than a voluntary association, that agency was not designated by either a state or federal statute or by the federal constitutional provision invoked as the authorized representative of the individual apple growers for purpose of pursuing individualized monetary relief. The general authority of the Washington State Apple Advertising Commission "to sue and be sued" (432 U.S. at 338 n.3) as a corporate entity does not constitute the kind of express *representational* authorization to protect the legal interests of designated individuals involved here and in the various examples discussed in our opening brief (at 36-43), nor is there any indication of concomitant fiduciary obligations (Pet. Br. at 41).

mining who among a voluntary association's members is "actually injured" and in assuring that those individuals receive the moneys due. Where there is such a Congressional determination, accompanied, as here, by fiduciary or analogous obligations,[18] however, the long history of representational litigation shows that the statutory designation is quite sufficient to indicate "reasonably . . . that the relief if granted will inure to" the represented individuals, whether the relief is injunctive or monetary. Pet. Br. at 42-46.[19]

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed.

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[18] The association standing issue concern expressed in *Warth* with regard to individualized relief—like any standing issue concern—arises only if suit is actually brought, not by reason of the association's inaction. And, as noted in our opening brief, once a representative does file a WARN Act suit, the duty of fair representation obtains. Pet. Br. at 12, n.4.

[19] We note that Brown Shoe is quite wrong in its suggestion that representational litigation depends on the representative having "title." *See* Uniform Probate Code §§ 3-101, 102 & comment to 711; 33 C.J.S. 2d § 252 (generally executors and administrators do not have title to heir's property). In any event, *Warth* at most suggests that any Congressional action providing representational authority in a suit for individual relief be reviewed to determine whether the statutory scheme is reasonably calculated to assure that the intended beneficiaries receive the relief to which they are entitled. For all the reasons surveyed above and in our opening Brief (at 16-27), the interrelated substantive and enforcement schemes of the WARN Act meet that test.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751, PETITIONER

v.

BROWN GROUP, INC., D/B/A BROWN SHOE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.*, requires covered employers to give an employee union advance notice of a plant closing or mass layoff, and expressly authorizes suits in federal court by unions to obtain monetary relief on behalf of their members for violations of the Act. The question presented is whether a union has standing under Article III of the United States Constitution to bring such a suit.

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INTEREST OF THE UNITED STATES

The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101 *et seq.*, requires covered employers to give employee unions 60 days' notice of a plant closing or mass layoff. The Act expressly authorizes federal suits by unions who represent aggrieved employees, and provides that back pay and benefits to such employees, the litigant's costs and attorney's fees, and (under certain circumstances) a civil penalty, "shall be the exclusive remedies for any violation." 29 U.S.C. 2104(b), 2104(a)(1), (3) and (6). This case presents the question whether a union seeking

to utilize the WARN Act's enforcement scheme in federal court has standing under Article III of the Constitution.

By holding that a union expressly authorized to sue under the WARN Act lacked standing to do so, the court of appeals effectively invalidated an important feature of the Act. The United States has an interest in the proper application of constitutional standing principles to the federal cause of action created by Congress through the WARN Act. In addition, the WARN Act grants the Secretary of Labor authority to "prescribe such regulations as may be necessary to carry out [the Act]," 29 U.S.C. 2107(a), and the Secretary has promulgated regulations that "establish basic definitions and rules for giving notice" under the Act. 20 C.F.R. 639.1(b). The WARN Act's notice provisions, moreover, are an important part of dislocated worker assistance programs for which the Department of Labor provides funding, standards, and assistance to the States. See Job Training Partnership Act, Tit. III, 29 U.S.C. 1651 *et seq.*; 20 C.F.R. 639.1(f). The Secretary therefore has a substantial interest in furthering the policies and purposes of the Act. The United States filed an amicus curiae brief in *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927 (1995), which concerned the proper statute of limitations for suits filed under the WARN Act.

STATEMENT

1. The WARN Act prohibits covered employers, with exceptions not relevant here, from "order[ing] a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice." 29 U.S.C. 2102(a). See generally *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927, 1929 (1995). The Act requires that the employer serve notice "to each representative of the

affected employees * * * or, if there is no such representative at that time, to each affected employee." 29 U.S.C. 2102(a)(1). The Act defines "representative" as "an exclusive representative of employees within the meaning of section [9](a) or [8](f) of" the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* See 29 U.S.C. 2101(a)(4).[1]

An employer who violates the Act's notice requirement "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * backpay for each day of violation," 29 U.S.C. 2104(a)(1)(A), as well as certain employment benefits, 29 U.S.C. 2104(a)(1)(B), for "the period of violation, up to a maximum of 60 days." 29 U.S.C. 2104(a)(1). The Act authorizes suits in district court by "[a] person seeking to enforce such liability, including a representative of employees," and further provides that the person "may sue either for such person or for other persons similarly situated, or both." 29 U.S.C. 2104(a)(5). Section 2104(b) of the Act provides that "[t]he remedies pro-

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[1] Section 9(a) of the NLRA provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. 159(a). Pursuant to Section 9(a), unions may be selected through an election conducted by the National Labor Relations Board, by obtaining authorization cards signed by a majority of the employees within the unit, or by other methods that present "convincing evidence of majority support." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 596 (1969). The term "representative" under the WARN Act includes exclusive representatives under the Railway Labor Act, 45 U.S.C. 152. See 29 U.S.C. 2101(a)(4).

vided for in this section shall be the exclusive remedies for any violation of this chapter." 29 U.S.C. 2104(b).[2]

2. Petitioner is the exclusive representative of employees at a shoe manufacturing plant operated by respondent. Pet. App. 13a-14a; Compl. ¶ 5.[3] Petitioner brought suit pursuant to 2104(a)(5) of the Act, alleging that respondent failed to provide proper notice to it of the closing of respondent's Dixon, Missouri plant[4] and the consequent layoff of 277 employees represented by petitioner.[5] Compl. ¶¶ 6-7. Pursuant to Section 2104(a), petitioner sought back pay and fringe benefits for each aggrieved employee for each day of employment loss that the employee suffered before the expiration of the sixty-day notice period. Pet. App. 14a; Compl. ¶ 10a. Petitioner also sought to recover its costs and attorney's fees. Pet. App. 14a; Compl. ¶ 10b.

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[2] In addition to back pay and benefits, prevailing plaintiffs may recover costs and attorney's fees. 29 U.S.C. 2104(a)(6). An employer who fails to give the requisite WARN Act notice to an affected unit of local government "shall be subject to a civil penalty of not more than $500 for each day of such violation." 29 U.S.C. 2104(a)(3). A local government aggrieved under that provision may bring an action in district court to recover the civil penalty. 29 U.S.C. 2104(a)(5).

[3] The district court's decision was rendered on respondent's motion to dismiss. The court was therefore required to accept all well-pleaded allegations in the complaint as true. See *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). This statement of the facts reflects that procedural posture.

[4] Petitioner alleged that a January 17, 1992 letter stating that respondent's plant would be closed beginning on March 20, 1992, was improperly mailed to an employee of the international union, and that, even if the notice was legally adequate, employees represented by petitioner were discharged before the sixty-day statutory period had elapsed. Pet. App. 2a; Compl. ¶¶ 7-9.

[5] Petitioner attached to its complaint, *inter alia*, a copy of its collective bargaining agreement with respondent and a list naming each of the 277 affected employees. Compl. App. A, C.

3. The district court dismissed the action on the ground that petitioner lacked standing to sue for back pay and benefits for the affected employees. The court acknowledged that the WARN Act expressly authorizes such suits, but held that petitioner had failed to demonstrate the minimum requirements for standing under Article III of the Constitution. Pet. App. 14a.

Stating that petitioner "has not alleged any injury to itself" (Pet. App. 14a), the court proceeded to consider the standing question solely in terms of whether the union could establish "associational" standing under the three-part test articulated by this Court in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Under the *Hunt* test, the district court explained, an organization has standing to raise claims on behalf of its members if: (1) the organization's members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Pet. App. 14a-15a (citing *Hunt*, 432 U.S. at 343). The court held that petitioner could not meet the third prong of the *Hunt* test because it sought only monetary relief on behalf of its members, and such claims would necessarily require the participation of individual members in the suit. Pet. App. 15a.[6]

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[6] The district court subsequently denied a motion to alter or amend the judgment, in which petitioner asked the court to accord it standing based on "the special nature of the relationship of a labor organization * * * and its members" or, alternatively, to grant petitioner 30 days in which to file an amended complaint seeking declaratory relief and adding affected individual employees as parties. Pet. App. 17a. The court declined to revisit its standing ruling, and denied petitioner's request for leave to amend its complaint. *Id.* at 18a-19a.

4. The court of appeals affirmed. Pet. App. 1a-12a. The court acknowledged that petitioner is an employee representative statutorily entitled to bring suit under the WARN Act. *Id.* at 4a. The court observed, however, that while "[a] federal statute may give a putative plaintiff the right to bring suit, thus relieving him of the judicially-created, prudential standing requirements, * * * the party seeking to have his claim heard nevertheless must comply with the Article III constitutional case or controversy requirements." *Id.* at 4a-5a (citations omitted).

The court first considered the union's direct standing to seek monetary relief under the WARN Act. In doing so, it analyzed whether petitioner had "alleg[ed] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Pet. App. 5a (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). The court concluded that petitioner had satisfied the first two requirements. With regard to the "injury" requirement, the court stated that the "gravamen" of petitioner's claim was the injury suffered by its members. *Id.* at 5a. Nonetheless, the court held that, construing the complaint liberally, it would "assume" that the complaint's allegation of failure to receive notice under the WARN Act alleged an injury to petitioner itself. *Id.* at 6a. The court reasoned, moreover, that because the "actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights," *ibid.* (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975), quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)), petitioner "[a]rguably" had "alleged 'an invasion of a legally protected interest' that is concrete and actual." *Id.* at 6a (quoting *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 113 S. Ct. 2297, 2302 (1993)). The

court concluded that the second requirement—that the injury be fairly traceable to the alleged conduct of the defendant—was "not an issue in th[e] case." Pet. App. 6a.

The court held, however, that the relief requested by petitioner would not redress its asserted injury. Pet. App. 6a-7a. Specifically, the court concluded that "[a]n award of monetary damages to any aggrieved employees would do nothing to remedy the alleged failure of notice to [petitioner]." *Id.* at 7a. The court further found that petitioner's request for "'such other and further relief on its behalf and that of the aggrieved employees as may be proper,'" was "boiler-plate remedies language" that failed to "comport[] with the constitutional requirements of redressability." *Ibid.* (quoting Compl. ¶ 10c).

The court of appeals distinguished *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), in which this Court found that a union had standing to recover monetary damages for union members in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. The court reasoned that "[t]he union had individual, direct standing [in *Hoosier Cardinal Corp.*] because its cause of action arose from a contract to which it was a party," while here, "[i]n contrast, the claims [petitioner] makes * * * are based on the WARN Act, rather than on a collective bargaining agreement." Pet. App. 7a n.5.

In addition, the court of appeals agreed with the district court that petitioner had not demonstrated associational standing on behalf of its members because it did not meet the third element of the *Hunt* test. Pet. App. 9a.[7] The court noted that petitioner did not seek de-

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[7] The court determined that the other two elements of the *Hunt* test were met. Section 2104(a)(5) of the WARN Act allows suits by

claratory or injunctive relief or damages for the union's own monetary loss, and that it did not have an assignment from its members of their monetary claims. *Id.* at 9a-10a. The court also observed that, in determining the appropriate back pay and benefits relief for any WARN Act violation, the district court would have to analyze each individual employee's circumstances and determine his or her date of termination, piecework pay rate, and medical expenses, in order to calculate damages. *Id.* at 10a. Because it believed that the relief petitioner sought would require the participation of each aggrieved union member, the court held that petitioner lacked associational standing. *Id.* at 11a.[8]

SUMMARY OF ARGUMENT

A. In order to establish direct standing to sue in federal court, a party must allege an injury to itself that is fairly traceable to the defendant's challenged conduct and is likely to be redressed by the relief sought. Petitioner's claim satisfies that standard.

The WARN Act imposes a legal duty on covered employers to notify unions of plant closings, and expressly authorizes suits by unions for breaches of that duty. The

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union members who are aggrieved employees, and those employees would be able to satisfy the Article III requirements of injury, causation and redressability. Thus, the court concluded, petitioner's members would have standing to sue in their own right. Pet. App. 8a. The court also found that the interest in obtaining WARN Act notice of a plant closure, and of redressing the loss of pay and benefits, suffered by the employees it represents, is "germane" to petitioner's purpose as the exclusive bargaining agent with respect to the employees' terms and conditions of employment with respondent. Pet. App. 9a.

[8] The court of appeals also held that the district court acted within its discretion in denying petitioner leave to amend its complaint. Pet. App. 12a; see note 6, *supra*. Petitioner did not seek review of that question in its petition for certiorari.

Act thereby affords unions a legal right, the invasion of which satisfies the requirement of personal injury. In enacting the WARN Act, moreover, Congress recognized the tangible harm to unions that unannounced plant closings cause, as well as the important role that properly notified unions play in worker retraining and readjustment efforts. An employer's failure to provide notice as required by the Act also impairs a union's role as exclusive bargaining representative under the federal labor laws, and damages the union's relationship with the employees it represents.

Petitioner's allegation that respondent failed to provide adequate notice of the closing of its Dixon plant clearly satisfies the requirement that the injury asserted be fairly traceable to the defendant's conduct.

The redressability requirement for standing is also satisfied. Just as Congress may exercise its legislative power to confer statutory rights, the invasion of which creates an injury within the meaning of Article III, it has authority to prescribe the remedies that will, in its judgment, appropriately redress the infringement of those rights. Here, Congress reasonably concluded that the injury to a union's role in the readjustment and collective bargaining processes that is caused by a WARN Act violation will be ameliorated by a remedy that improves the fiscal security of its members.

B. Another factor relevant to the standing inquiry is the extent to which a dispute is one traditionally thought to be capable of judicial resolution. Because unions have a pre-existing duty of fair representation toward members of their bargaining unit, permitting them to litigate on behalf of aggrieved employees is consistent with traditional forms of representational litigation, such as suits by trustees, guardians, or "next friends."

C. Petitioner's suit also satisfies the constitutional requirements for associational standing. Petitioner's members would have standing to sue in their own right, and the interests petitioner seeks to protect are germane to its statutory and organizational purposes. While the court of appeals found petitioner to lack associational standing because the relief it requested would require the participation of individual employees, we believe that the "individual participation" rule is a prudential consideration that may be displaced by Congress. The rule appears to derive from concerns about judicial management and litigation by third parties that this Court has held to be prudential rather than constitutional in nature. Moreover, the courts routinely entertain representative suits for damages to aggrieved individuals where Congress has authorized such litigation.

ARGUMENT

A UNION REPRESENTING EMPLOYEES AFFECTED BY A VIOLATION OF THE WARN ACT HAS STANDING TO SUE THE EMPLOYER TO RECOVER BACK PAY AND BENEFITS ON BEHALF OF THE EMPLOYEES

Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" or "Controversies." This Court has defined that limitation through a number of principles, including the requirement of standing. The standing doctrine includes both constitutional and "prudential" elements. The constitutional elements are "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The prudential considerations, by contrast, are aspects of "judicial self-government," *ibid.*, by which "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access

to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Accordingly, where the requirements of Article III are satisfied, Congress may, by legislation, permit litigation by parties "who would otherwise be barred by prudential standing rules." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

In this case, there can be no question that Congress has expressly authorized a union in petitioner's position to sue. See 29 U.S.C. 2104(a)(5). By holding that petitioner nevertheless lacks standing to do so, the court of appeals effectively held unconstitutional an important feature of the WARN Act. "Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981)). Here, the court of appeals failed to give the deference owed to the judgment of Congress that a union is a proper party to vindicate the WARN Act rights of employees it represents.

A. Petitioner Has Standing In Its Own Right To Sue Respondent Under The WARN Act

In order to establish direct standing to sue in federal court, a party must allege (1) "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and (3) is "likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). Petitioner has satisfied each of these requirements.

1. It is well established that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. at 500 (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3

(1973)); see also *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-212 (1972). "[N]oneconomic injuries," moreover, "may suffice to provide standing." *Gladstone, Realtors*, 441 U.S. at 112; see also *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972). In this case, petitioner alleged in its complaint that respondent failed, in violation of Section 2102 of the WARN Act, to notify the union that it planned to close its Dixon plant and discharge 277 employees represented by petitioner. Pet. App. 6a; Compl. ¶ 7. That contention clearly alleged the "invasion of a legally protected interest" possessed by petitioner, *Northeastern Fla. Chapter of Associated Gen. Contractors* v. *City of Jacksonville*, 113 S. Ct. 2297, 2302 (1993), and satisfied the constitutional requirement of personal injury.

Section 2102 imposes a legal duty on covered employers to provide a union 60 days' notice of a plant closing or mass layoff. See *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927, 1929 (1995). In so doing, the provision confers on unions a corresponding right to receive such notice at the time, and in the manner, required by the Act. The statutory right to notice created by the WARN Act, moreover, falls comfortably within the range of legal interests that this Court has recognized as sufficient to confer standing. In *Havens Realty*, for example, the Court considered the standing of various individuals and organizations to sue under Section 812(a)

of the Fair Housing Act of 1968, 42 U.S.C. 3612(a).[9] The Court concluded that, by making it unlawful under Section 804(d) for a party covered by the Fair Housing Act "[t]o represent [falsely] to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental," 42 U.S.C. 3604(d), and by making that prohibition enforceable through Section 812(a), "Congress has * * * conferred on all 'persons' a legal right to truthful information about available housing." *Havens Realty*, 455 U.S. at 373. Accordingly, the Court found that a "tester" plaintiff in *Havens Realty* who received false housing information from a real estate agent had standing to sue, notwithstanding the fact that "the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home." *Id.* at 374.[10]

The right to notice established by the WARN Act closely parallels the right to truthful housing information at issue in *Havens Realty*. There is no question, moreover, that petitioner "has suffered injury in pre-

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[9] Section 812(a) of the 1968 Act provides in pertinent part:

> The rights granted by sections 3603, 3604, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction.

42 U.S.C. 3612(a) (1982).

[10] In contrast, the Court held that a second tester, who did not receive false information, "ha[d] alleged no injury to his statutory right to accurate information concerning the availability of housing," *Havens Realty*, 455 U.S. at 375, and therefore lacked standing under the Fair Housing Act.

cisely the form the statute was intended to guard against." 455 U.S. at 373.

Nor is the injury petitioner asserts merely a "generalized grievance * * * common to all members of the public." *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 575 (internal quotation marks omitted).[11] As Congress recognized when it passed the WARN Act, unions are directly affected by mass layoffs of their members, and they have an integral role to play in the coordination of retraining, financial assistance, and other services, before and after the displacement occurs. Cf. *International Union* v. *Brock*, 477 U.S. 274, 286 (1986) (by giving unions a role in the administration of the trade readjustment allowance benefit program, Congress "[r]ecogniz[ed] the interest of organized labor in obtaining benefits for its workers").

Congress viewed prior notice of plant closings as essential to successful worker readjustment programs.[12] See,

[11] This aspect of the holding in *Lujan* was limited to "suits against the Government." 504 U.S. at 578. Accordingly, it remains an open question what limits Article III imposes on Congress's ability to confer standing on members of the public to challenge in court the conduct of private parties. In any event, for the reasons we discuss herein, Congress's conferral of standing on the exclusive representative of employees aggrieved by mass layoffs does not approach the outer limits of congressional authority.

[12] Plant-closing provisions nearly identical to the WARN Act were initially passed by Congress in an omnibus trade bill, H.R. 3, 100th Cong., 1st Sess. (1987), that contained a worker adjustment program. The plant-closing notification provisions of that legislation were viewed as complementary to the worker adjustment program. See H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1045 (1988) ("the Conferees reaffirm that advance notice is an essential component of a successful worker readjustment program and * * * [that] the two Subtitles [pertaining to worker adjustment and plant closings] are closely related"). The trade bill was vetoed by President Reagan, largely because of the plant-closing provisions. 134 Cong. Rec. 12,130 (1988) (veto message). The trade bill was subsequently enacted without the plant-closing provisions. See Pub. L. No. 100-418, 102 Stat. 1107. Congress passed the WARN Act, which contains provisions nearly identical to the plant-closing provisions of H.R. 3, and the President permitted the law to take effect without his signature. There is thus a clear connection between plant notification provisions and worker adjustment programs. See 29 U.S.C. 2102(a)(2) (requiring employers to give notice of plant closing or mass layoff to state dislocated worker unit designated or created under the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.*).

e.g., 134 Cong. Rec. 15,928 (Sen. Metzenbaum) ("[t]he important element in our bill is to see to it that people have the time to seek readjustment and retraining while they are working"); *id.* at 15,518 (1988) (Sen. Chafee) (WARN Act's notice provision was designed to permit "worker[s] and the community to prepare for the crisis, to respond to the need for job placement, retraining, education, financial assistance—all the demands that arise in these situations"). Accordingly, Congress sought to facilitate the beneficial role that unions play in the readjustment process when they receive adequate notice. See, *e.g.*, S. Rep. No. 62, 100th Cong., 1st Sess. 1045 (1987) ("A strong union role also generates trust and confidence in the workforce about the overall utility of the program."); 134 Cong. Rec. 15,514 (1988) (Sen. Byrd) ("every sector of the community—management, *labor*, local government, and other local businesses—must be given time to adjust to an unwanted and traumatic business situation") (emphasis added);[13] *ibid.* (Sen. Byrd)

[13] In addition to requiring notice to employee representatives and employees, the WARN Act requires employers to give notice of plant closings and mass layoffs to "the chief elected official of the unit of local government within which [the] closing or layoff is to occur," and to "the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [(JTPA)] [29 U.S.C. 1651

("[The WARN Act] makes sense because it breaks new ground in management-labor relations. * * * Management and labor must forge a new relationship if America is to compete against our foreign competition."); see also *Report of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation in a Competitive Society* 4 (Dec. 1986) (the *Brock Report*) ("the most effective and successful dislocated worker adjustment programs are those where the employer and workers (*and their unions if they are present*) are directly involved in the design and delivery") (emphasis added); see also S. Rep. No. 62, *supra*, at 1045 (quoting foregoing language from *Brock Report*).[14]

In addition, a central purpose of the employee-union relationship that is recognized and facilitated by the federal labor laws is the union's participation in collective bargaining negotiations on behalf of employees "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. 159(a) (National Labor Relations Act); see *Brock*, 477 U.S. at 286. While an employer has no duty to bargain with its employees' union over its decision to terminate operations at a given facility, or to initiate a partial shutdown, *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), it is required to bargain in good faith

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et seq.])." 29 U.S.C. 2102(a)(2). Employer notice to state dislocated worker units is a first step in the activation of employment and training programs for dislocated workers under the JTPA. 20 C.F.R. 639.1(a) and (f).

[14] Supporters of the WARN Act repeatedly cited the *Brock Report* as a source of empirical evidence of the beneficial effects of notice of plant closings. See, *e.g.*, 134 Cong. Rec. 15,518 (1988) (Sen. Gore); *id.* at 15,779 (Sen. Simon); *id.* at 15,782-15,784 (Sen. Riegle); S. Rep. No. 62, *supra*, at 9.

regarding the *effects* of such a decision. *Id.* at 681. Where a sudden, unannounced plant closing or layoff results in the termination of the employees that a union represents, that role is frustrated. See *Havens Realty*, 455 U.S. at 379 & nn.20, 21 (frustration of organizational function and activities sufficient to confer standing where statutory right is infringed).

2. As the court of appeals correctly observed (Pet. App. 6a), petitioner's claim clearly satisfies the requirement that the injury asserted be "fairly traceable to the defendant's allegedly unlawful conduct." *Allen*, 468 U.S. at 751. Respondent's failure to notify petitioner of the impending plant closing at the time, and in the manner, specified by the WARN Act resulted in a denial of petitioner's right to notice under the statute.

3. The redressability prerequisite for standing is also met in this case. Just as Congress may exercise its legislative power to confer statutory rights, the invasion of which creates an injury within the meaning of the Article III inquiry, it has authority to fashion remedies that will, in its judgment, appropriately redress the infringement of those rights. Indeed, where, as here, the legal interest asserted did not exist prior to Congress's intervention, the right and remedy in question are inextricably intertwined, and it is necessarily within Congress's power to create a remedial scheme that it deems likely to redress a statutorily based harm.[15] Where Congress expressly determines that a particular form of relief will suitably compensate for or rectify the infringement of a right it has created, the entertainment of suits

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[15] Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

for such relief under the designated statutory framework is in no way "inconsistent with the judicial function" under Article III. *Sierra Club*, 405 U.S. at 732 n.3; see *Muskrat* v. *United States*, 219 U.S. 346, 357 (1911) (cases and controversies refer to "the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs"; a case exists whenever a claim "takes such form as the judicial power is capable of acting upon it").

In this case, the court of appeals found an inadequate nexus between the right asserted and the remedy sought because, in its view, "[a]n award of monetary damages to any aggrieved employees would do nothing to remedy the alleged failure of notice to [petitioner]." Pet. App. 7a. Contrary to the court of appeals' assumption, however, the fact that the relief sought by petitioner will have the effect of benefiting third parties (aggrieved employees) does not lead to the conclusion that the relief will not *also* remedy the injury alleged by petitioner. See, *e.g.*, *Trafficante*, 409 U.S. at 208-212 (housing applicant's statutory right not to be denied housing based on race conferred on *current* residents a legal interest in living in a racially integrated community); *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 578 (discussing *Trafficante*); cf. *Warth* v. *Seldin*, 422 U.S. at 501 (where Article III injury requirement is satisfied, "persons to whom Congress has granted a right of action * * * may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim").

Here, moreover, the third parties who will benefit financially from the relief awarded by the court are not strangers to the dispute. The WARN Act's requirement

that notice be given to the union is ultimately for the benefit of the employees it represents, and as we have explained, a primary aspect of the injury to unions in petitioner's position is an impairment of their ability to aid aggrieved employees in obtaining retraining and placement in new positions. See, *e.g.*, 134 Cong. Rec. 15,514 (1988) (Sen. Byrd) ("[The WARN Act] allows the communities and the workers and management * * * the opportunity to put into place retraining programs while there is still time, *while the workers are still getting a paycheck*.") (emphasis added). The union's ability to recover for the employees the back pay and benefits owed by the employer under the Act serves to make up for the union's inability to furnish timely assistance to those employees, as a result of the employer's violation. The nature of the remedy in a case such as this thus is precisely tailored to the nature of the violation: the employer's failure to give notice *to* the union for the benefit of the employees gives rise to a suit *by* the union for the benefit of the employees. In short, it requires no leap of logic to conclude that ameliorating the devastating economic impact of unannounced layoffs on affected employees will also benefit the labor unions that serve them.

The remedial scheme prescribed by the WARN Act also has an important deterrent function that reinforces the reasonableness of the remedial scheme. Cf. *North Star Steel*, 115 S. Ct. at 1929 (referring to employer's liability for "penalties" under 29 U.S.C. 2104(a)(1)). The Act's relief provisions are designed in large part to discourage employers from disregarding the advance notice requirement. Cf. *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 547 (1988) ("Congress added [the Employee Retirement Income Security Act's] strict remedies to

give employers a strong incentive to honor their contractual obligations to contribute" to employee pension funds.). Indeed, Congress rejected an amendment to the bill that would have permitted employers to provide severance pay in lieu of prior notice.[16]

Back pay and benefits awards to affected employees serve to ameliorate the damage to the union's role in the collective bargaining and worker readjustment processes that results from a WARN Act violation. Unions directly benefit from the availability of monetary damages against noncomplying employers because the prospect of an award of damages, like an injunction, serves to deter violations, and thereby to safeguard the role of unions generally when plant closings and mass layoffs occur. And because the employees will have dispersed after the violation, the union often may be in the best position to effectuate the remedial and deterrent purposes of the Act by ensuring that the employer will not avoid its liability to some or all of the employees it injured.

4. Contrary to the court of appeals' conclusion (Pet. App. 7a-8a n.5), *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), strongly supports union standing in this case. In *Hoosier Cardinal*, the Court held that a union had standing under Section 301(b) of the Labor Management Relations Act[17] to seek wages and

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[16] In opposing an amendment by Senator Quayle that would have permitted employers to comply with the Act by giving "severance pay in lieu of notice," 134 Cong. Rec. 15,926 (1988), Senator Metzenbaum, the Act's principal sponsor in the Senate, emphasized that "the bill is about giving notice. It is not a mandatory severance bill." *Id.* at 15,928.

[17] Section 301(b) provides in pertinent part that "[a]ny * * * labor organization may sue * * * in behalf of the employees whom it represents in the courts of the United States." 29 U.S.C. 185(b).

vacation pay on behalf of employees for the violation of a collective bargaining agreement to which the union was a party. 383 U.S. at 699-700. The court below sought to distinguish *Hoosier Cardinal* on the ground that there the union alleged the breach of a collective bargaining agreement, while here petitioner alleges a violation of an Act of Congress. Pet. App. 7a-8a n.5. In each case, however, the union relied on Congress's determination that it could sue for back pay in order to vindicate its representational interests. That the right asserted by the union in this case is statutory rather than contractual has no bearing on the question of Article III standing.[18]

Indeed, the right and remedy that arise from the WARN Act are comparable in significant respects to the operation of third-party-beneficiary contracts. Because the union's legal interest in both situations is in securing economic benefits for third parties (aggrieved employees), the remedy best tailored to redressing an infringement of the *union's* interest is payment by the employer to the employees of the amounts owed to them, whether under a contract entered into by the union or under a statute in which Congress has given the union a comparable role.[19]

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[18] Moreover, in *Hoosier Cardinal*, the contract the union sued to enforce was itself entered into pursuant to a statute (the NLRA) enacted by Congress to regulate the collective-bargaining process.

[19] See 2 Restatement (Second) of Contracts § 305, at 451-452 (1981):

> The promisee of a promise for the benefit of a beneficiary has the same right to performance as any other promisee, whether the promise is binding because part of a bargain, because of his reliance, or because of its formal characteristics. If the promisee has no economic interest in the performance, as in many cases involving gift promises, the ordinary remedy of damages for breach of contract is an inadequate remedy, since only nominal

B. Petitioner's WARN Act Claim is Consistent With Traditional Forms of Representational Litigation

Another consideration relevant to the standing inquiry is the extent to which the dispute at issue is one "traditionally thought to be capable of resolution through the judicial process." *Allen* v. *Wright*, 468 U.S. at 752 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968)); see also *Valley Forge Christian College* v. *Americans United For Separation of Church and State*, 454 U.S. 464, 472-473 (1982). A union's cause of action under the WARN Act is consistent with the many instances recognized in the law in which a party is authorized to represent the interests of another with whom it has a legally significant relationship. "Trustees, guardians, and personal representatives are familiar examples" of well accepted legal surrogates, 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3531.9, at 627 (1984), as are persons authorized to sue as "next friend" of a third party. See *Whitmore* v. *Arkansas*, 495 U.S. 149, 161-162 (1990) (noting that "the concept of 'next friend' standing * * * has long been an accepted basis for jurisdiction in certain circumstances"). In each of those instances, courts allow one party to sue on another's behalf because the litigant has an independent duty to pursue the third party's interests arising from "some significant relationship" with that party. *Id.* at 164.

The statutory relationship between unions and the employees they represent fits well within the historical tradition of representational litigation. The WARN Act adopts its definition of "representative" from the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* See 29 U.S.C. 2101(a)(4). Under the NLRA, unions are

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damages can be recovered. In such cases specific performance is commonly appropriate.

selected by employees within a collective bargaining unit through methods endorsed by Congress, see note 1, *supra*, and they are recognized by an administrative agency—the National Labor Relations Board—as the exclusive representatives of those employees in the collective bargaining process.

The NLRA imposes on a union a duty of fair representation to unit employees that this Court has described as "akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots* v. *O'Neill*, 499 U.S. 65, 75 (1991). That duty includes "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967). The obligation is a continuing one and is not strictly limited to matters of contract administration. See, *e.g.*, *Breininger* v. *Sheet Metal Workers*, 493 U.S. 67, 87-89 (1989) (duty applies where union operates a hiring hall).

In light of that legislative background, Congress's designation of labor unions to represent employees' rights under the WARN Act is unremarkable. A union's independent duty to represent employees' interests in the work place makes it a particularly appropriate party to litigate those employees' rights in the context of unannounced layoffs or plant closings. Cf. *Hoosier Cardinal*, 383 U.S. at 700 ("[I]ndeed, the union's standing to vindicate employee rights under §301 [of the Labor Management Relations Act] implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract.").

C. Petitioner Has Associational Standing to Sue Respondent Under The Warn Act

For the reasons discussed above, petitioner has standing, both in its own right and in a statutorily conferred representational capacity, to challenge respondent's failure to provide notice under the WARN Act and to seek the statutory remedy of back pay and benefits for aggrieved employees. As we shall now explain, petitioner's suit also satisfies the requirements of Article III under the doctrine of associational standing.

"It has long been settled that '[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members.'" *Brock*, 477 U.S. at 281 (quoting *Warth* v. *Seldin*, 422 U.S. at 511). Although the invocation of associational standing "does not eliminate or attenuate the constitutional requirement of a case or controversy," *Warth* v. *Seldin*, 422 U.S. at 511, the Court has held that, "under certain circumstances, injury to an organization's members will satisfy Article III and allow that organization to litigate in federal court on their behalf." *Brock*, 477 U.S. at 281; see also *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976).

The Court has held that an association has standing to bring suit on behalf of its members when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Brock, 477 U.S. at 282. See also *Hunt*, 432 U.S. at 343; *Warth* v. *Seldin*, 422 U.S. at 511.

In this case, the first and second requirements are plainly satisfied. The aggrieved employees represented by petitioner were directly affected by respondent's allegedly deficient notice, and they would unquestionably benefit (in a manner contemplated by the Act) from a back pay award. See Pet. App. 8a. The interests the union seeks to protect through this litigation, moreover, are germane both to petitioner's role as an exclusive bargaining representative, and to its status as the intended recipient of plant-closing and layoff notification under the WARN Act. 29 U.S.C. 2102(a)(1). See Pet. App. 8a-9a. The decision to cease operations or lay off employees en masse "touches on a matter of central and pressing concern to the union and its member employees." *First National Maintenance*, 452 U.S. at 677.

The court of appeals concluded that the third requirement for associational standing was not met because, in its view, the back pay remedy authorized by the WARN Act would require the participation of individual employees in the lawsuit. Pet. App. 10a. In our view, however, the concern expressed in associational standing cases regarding the need for individualized proof is of prudential, rather than constitutional, dimensions. Any such impediment therefore is displaced in WARN Act suits by Congress's express authorization for a union to bring an action for damages.

The "individual participation" rule appears to derive from the concern that "[t]he courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976) (Blackmun, J.); see also *Holden* v. *Hardy*, 169 U.S. 366, 397 (1898) (assertion of third parties' rights would come with "greater cogency" from the third

parties themselves). The Court has stated repeatedly, however, that the "third-party standing" prohibition, which responds to that concern, is a prudential dictate. See, *e.g.*, *Valley Forge Christian College*, 454 U.S. at 474; *Gladstone, Realtors*, 441 U.S. at 99; *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978). Accordingly, the analogous rule concerning the possible need for individual participation in a suit brought by an association is similarly prudential in nature and is not a barrier when a statute such as the WARN Act expressly authorizes an organization to recover a money judgment for the benefit of aggrieved individuals.

In addition, the "individual participation" rule's focus on the form—as opposed to the substance—of a plaintiff's proof implicates judicial management concerns characteristic of prudential standing requirements. See *Warth* v. *Seldin*, 422 U.S. 515 (noting potential difficulties of administering monetary relief to aggrieved individuals in an associational suit); see also 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3531.9, at 621 (1984) (suggesting that the individual participation rule may be based on the "significant burden [that] might be entailed by the need [for the court] to supervise distribution of any recovery from the organization to its injured members"). While the pragmatic issues surrounding the litigation of claims for individualized relief are clearly relevant to judicial self-governance, they do not diminish "that concrete adverseness" on which Article III standing depends. *Brock*, 477 U.S. at 289 (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

The courts frequently entertain representative litigation under back pay statutes created by Congress. For example, in litigation under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, courts commonly permit the testimony of a few representative employees in order to

provide a basis for establishing back pay awards for all affected employees. See generally *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). More generally, class actions brought pursuant to Rule 23 of the Federal Rules of Civil Procedure are not limited to suits for declaratory or injunctive relief. Rather, named plaintiffs in such suits may litigate the case on behalf of the class, irrespective of whether individual class members must ultimately testify as to questions of liability or relief.[20] See, *e.g.*, Barbara L. Schlei & Paul Grossman, *Employment Discrimination Law* 1322 & 1454 (2d ed. 1983) (describing litigation of class-wide disparate treatment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*). While this Court has not expressly passed on the adequacy of such litigation schemes under Article III, their prevalence in the modern legal landescape strongly suggests that they are within Congress's authority to create.

Similarly, a number of federal statutes expressly authorize federal officials or agencies to sue in federal court in order to recover monetary relief for aggrieved individuals. For example, in *General Telephone Co.* v. *Equal Employment Opportunity Commission*, 446 U.S. 318 (1980), the Court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), authorizes the EEOC to seek back pay relief on behalf of "those persons adversely affected" by unlawful employment discrimination "in an amount to be proved at trial." 446 U.S. at 324; see also Black Lung Benefits Act (BLBA), 30

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[20] Class actions differ in significant respects from suits premised on associational standing. In both categories of cases, however, a representative may establish unlawful conduct and seek relief on behalf of third parties in a proceeding in which individualized proof is required.

U.S.C. 932(k) ("The Secretary shall be a party in any proceeding relative to [a] claim for benefits."); Fair Labor Standards Act, 29 U.S.C. 216 (authorizing Secretary of Labor to bring actions "to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages").

In *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1286 (1995), the Court considered whether the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, confers standing on the Director of the Office of Workers' Compensation Programs in the Department of Labor to seek judicial review of the denial of disability benefits to individuals by the Benefits Review Board. The Court held that the Director did not fall within the definition of "person[s] adversely affected or aggrieved" by the Board's decision, to whom the statute granted a right to judicial review. 33 U.S.C. 921(c). The Court observed, however, that Congress has the constitutional authority to confer such standing on federal officials when it chooses to do so. Relying on its decisions in *General Telephone Co.*, *supra*, and *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976), the Court concluded in *Newport News* that "[t]hose two cases certainly establish that Congress *could* have conferred standing upon the Director without infringing Article III of the Constitution; but they do not at all establish that Congress did so." 115 S. Ct. at 1286.

In light of the separation of powers concerns that underlie the doctrine of standing, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 560, and because the federal government represents the public interest in litigation to which it is a party, standing principles applicable to federal officials and agencies may not be entirely transferable to suits between private parties. Nonetheless, the Court's recognition of the appropriateness of entertaining suits brought by the government for individualized relief that benefits aggrieved third parties strongly supports the conclusion that the individual participation aspect of associational standing doctrine in private litigation is prudential in nature.

Finally, the relationship between a union and the individual employees it represents makes the former an appropriate party to assert the latter's interests in obtaining monetary relief under the WARN Act. As previously noted, the federal labor laws impose on unions a duty of fair representation. See generally *Vaca* v. *Sipes*, *supra*; see also *Hoosier Cardinal*, 383 U.S. at 700. Unions, moreover, bring to WARN Act litigation "a preexisting reservoir of expertise and capital," as well as "specialized expertise and research resources relating to the subject matter of the lawsuit" that individual plaintiffs—here, unemployed workers—often lack. *Brock*, 477 U.S. at 286 (internal quotation marks omitted).[21] Where, as here, Congress has expressly designated a party as a proper guardian of the rights of its members before the courts, Article III does not require that that choice be rejected.

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[21] As the Court recognized in *Brock*, 477 U.S. at 290, there may be cases in which an organization asserting associational standing will be unable to represent adequately the interests of all of its injured members. In such cases, the Court observed, "a judgment won against [the association] might not preclude subsequent claims by the association's members without offending due process principles." *Ibid.* In the present case, however, there is no indication that the union will not adequately represent the legal interests of aggrieved employees.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for proceedings on the merits of petitioner's claims.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 751,
Petitioner,
v.
BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, THE ASSOCIATION OF FLIGHT ATTENDANTS, THE FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AREOSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

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STATEMENT OF INTEREST OF AMICI CURIAE

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES is the largest federal employee union representing 700,000 workers nationwide and overseas. Workers in virtually all functions of government, at every federal agency, depend upon AFGE for legal representation, legislative advocacy, technical expertise and informational services.

THE ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, (AFA) is a labor union which represents over 38,000 flight attendants on 27 airlines around the country. Since 1978, when Congress deregulated the airline industry, dozens of airlines have gone bankrupt or ceased operations, resulting in the loss of tens of thousands of jobs due to the economic conditions caused by deregulation. As a result, AFA's members, many of whom previously worked at airlines that are now defunct, are keenly aware of the importance of ensuring that AFA retains the right to enforce the WARN Act's protections for the benefit of its members. AFA therefore joins in the filing of this brief in support of Petitioner.

THE FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL was established in 1988 and is a nationwide network of 32 community-based organizations challenging deindustrialization by implementing models for local, state and federal community-responsible industrial policy. Among its member organizations are: Cleveland Coalition Against Plant Closings; Midwest Center for Labor Research of Chicago, Illinois; Seattle Workers' Center; Tennessee Industrial Renewal Network of Knoxville, Tennessee; Coalition for Economic Justice of Buffalo, New York; Tompkins/Cortland Labor Coalition of Ithaca, New York; CommonWorks of Syracuse, New York; and the Ohio Valley Industrial Renewal Project of Wheeling, West Virginia.

THE INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE) is a union with 365,000 members,

a substantial portion of whom are skilled maintenance workers employed in facilities subject to the vagaries of plant shutdowns and relocations. The IUOE wishes to preserve the ability of its local unions to pursue WARN litigation on behalf of these members and therefore joins in the filing of this brief.

THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) is a labor organization of about 900,000 active members and more than 500,000 retired members. The UAW has been and continues to represent their members in litigation pursuant to the WARN Act. Accordingly, the UAW joins in the filing of this brief in support of Petitioner.

THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA) is one of the largest unions in North America and represents employees in construction, manufacturing, food processing, service industries, environmental remediation, health care, federal, state and local government and the United States Postal Service. Tens of thousands of its members are employed in industries that are plagued by plant closings and layoffs. The workers LIUNA represents in low-wage industries are especially vulnerable. LIUNA maintains a continuing strong interest in representing its members in WARN Act litigation. For these reasons it joins in the filing of this brief.

THE MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE (Guild Law Center) is a national public interest litigation center that has concentrated its efforts in the area of plant closings and mass layoffs, particularly on the rights of dislocated workers through the enforcement of the WARN Act. As the national clearinghouse for all WARN Act litigation, the Guild Law Center represents hundreds of workers directly and thousands indirectly by providing technical assistance to their attorneys. The Guild Law Center thus represents the interests of WARN plaintiffs across the

country in the outcome of this proceeding, and submits this *amici curiae* brief on behalf of Petitioner.

THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (OCAWIU) is a labor organization which represents employees throughout the country. The right of OCAWIU to file WARN claims on behalf of its members will be directly affected by the outcome of this proceeding. OCAWIU has been, and continues to represent their members in WARN Act litigation. For these reasons, the OCAWIU submits this *amici curiae* on behalf of Petitioner.

THE SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) represents over one million workers in the health care, building service, and amusement industries as well as in a variety of other industries. It also represents many workers in the public sector. Many of its members, including those who work in its health care and allied and industrial division, work for employers who are subject to WARN. Where an employer who employs SEIU members closes a plant, SEIU or one of its affiliated local unions might very well want to file suit under WARN to protect the interests of its members and the union.

THE SHEETMETAL WORKERS' INTERNATIONAL ASSOCIATION is a building and construction trade union of roughly 135,000 members. Approximately one-third of the membership works in production and fabrication shops where the greatest job loss due to plant closings occur. The union has lost approximately 2,000 members due to plant closings from 1993-1995. The union is 100 years old and has 200 locals throughout the country.

THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) is a national, independent union comprised primarily of approximately 40,000 production and salaried workers in major manufacturing chains, and in hundreds of independent companies in the electrical manufacturing, machine-building

and plastics industries. UE also represents city, county and state public sector employees. The UE and its members have a significant interest in the rigorous enforcement of WARN due to the de-industrialization of the United States as a result of international trade agreements and other factors, which result in the shutting down of production facilities which employ UE members. UE has, and continues to represent, its members in WARN litigation. For these reasons, the UE submits this brief in support of Petitioner.

THE UNITED MINEWORKERS OF AMERICA, INTERNATIONAL UNION ("UMWA") is a labor organization headquartered in Washington, D.C. The UMWA has approximately 175,000 members in the United States, most of whom are coal miners. The UMWA and its members, as well as coal dependent communities throughout the country's coal fields, have a significant interest in the rigorous enforcement of the WARN Act due to the nature of coal as a depletable resource, thus occasioning the continuous shutdown and relocation of mining operations. The UMWA has and continues to represent their members in WARN Act litigation. Therefore, the UMWA joins in this brief in support of Petitioner.

THE UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO, CLC (UNITE), is a merger of the Amalgamated Clothing and Textile Workers Union, and the International Ladies Garment Workers' Union. UNITE is the largest union in the United States and Canada representing apparel and clothing workers. It has about 500,000 members. Garmet and textile workers are low paid and typically insensitive to their legal rights. Many are newly arrived immigrants with poor language skills. Garment and textile workers, like farm workers, are employed in a highly seasonal industry, and depend on their union to enforce their rights.

The issues presented in this case have a direct impact on the rights of the clients and members of the *amici*

herein. The decision in this case will directly affect the ability of several hundred thousand workers to effectively enforce their substantive federal rights under WARN.

SUMMARY OF ARGUMENT

This case will decide whether a labor union has standing to enforce the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-09, against an employer who had failed to provide advance notice of layoffs to either the union or the workers represented by that union. In denying standing to Local 751 of the United Food and Commercial Workers Union (UFCW), despite its conclusion that the union had alleged an injury to itself, the court below erroneously determined that "[a]n award of monetary damages to any aggrieved employees would do nothing to remedy the alleged failure of notice to the UFCW." *United Food and Commercial Workers Int'l Union, Local 751 v. Brown Group, Inc.*, 50 F.3d 1426, 1430 (8th Cir. 1995). This determination reflected a flawed conception of the purposes of WARN, a faulty understanding of the role which monetary relief plays in furthering WARN's purposes, and the imposition of an extremely restricted view of the role that unions serve as a representative of their members' interests.

Acting upon its erroneous reading of WARN's purpose and remedies, the Eighth Circuit panel failed to give proper recognition to the Congressionally-established integral role of labor unions as integral in effectuating the purposes of WARN. *Amici* submit that the Eighth Circuit panel's constricted application of standing principles will not withstand scrutiny in the light of the structure, legislative history, and substantive legal rights of WARN.

Properly considered, labor union standing to enforce WARN falls well-within this Court's Article III standing jurisprudence, even in the absence of express Congressional authorization to unions to sue to enforce WARN.

See International Union, UAW v. Brock, 477 U.S. 274 (1986). Amici submit that the Eighth Circuit panel erred by ignoring Congress' mandate that unions, as "representatives", may sue on behalf of their members.[1] However, assuming that Congress had not included such a provision, Amici argue that the UFCW still satisfied Article III's core requirements, and the test articulated in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Amici therefore fully support the arguments set forth in the UFCW's brief, but focus herein primarily upon this mistaken assumption.

At the most fundamental level, unions clearly suffer cognizable injuries to their interests when advance notice of layoffs is not provided. The Eighth Circuit panel failed to recognize that union enforcement of WARN's civil penalties acts both as punishment for the statutory violation and as a deterrent to ensure future compliance with WARN's advance notice requirements. This failure resulted in the erroneous conclusion that the union's injuries are not redressable through a suit for monetary relief on behalf of affected workers. Indeed, pursuant to WARN, that is the only possible redress. Further, this failure resulted in the erroneous conclusion that union enforcement of WARN to collect civil penalties is analogous to actions for compensatory damages, and therefore that the individual participation of union members was required. These errors led to a misapplication of standing doctrine as it has been developed by this Court.

For these reasons, *amici* join with petitioner UFCW in urging this Court to reverse the judgment dismissing this case for lack of standing.

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[1] Congress provided in WARN that: "A *person* seeking to enforce such liability, *including a representative of employees* or a unit of local government aggrieved under paragraph (1) or (3), *may sue either for such person or for other persons similarly situated, or both*, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." 29 U.S.C. § 2104(a)(5).

ARGUMENT

UNIONS HAVE STANDING TO REPRESENT THEIR MEMBERS IN SUITS ENFORCING THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT.

A. Failure to Provide Advance Notice of Layoffs or Plant Closing in Compliance with WARN Harms Unions as Well as Their Members.

a. The Eighth Circuit panel erroneously assumed that in the absence of the statutory provision allowing a union to sue as the "representative" of dislocated workers, 29 U.S.C. § 2104(a)(5), that the UFCW could not satisfy Article III association standing principles. In fact, the opposite is true: A lawfully recognized union may assert its bargaining unit members' WARN claims so long as the Article III "case or controversy" requirement is met.

The touchstone here is that the injury is direct, and its nature precise. Significantly, this case satisfies the heart of Article III; namely, the requirement that the association's members suffer a "distinct and palpable injury." *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). Further, the union's interests are protected by WARN, making the UFCW a "litigant entitled to have the court decide the merits of the dispute." *Warth*, 422 U.S. at 498. Indeed, the lower court's approach is contrary to this Court's charge that "standing is gauged by the specific common-law, statutory, or constitutional claims that a party presents." *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

The sine qua non of standing jurisprudence is that the entity seeking standing first possess a legally enforceable right. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983) ("[i]n each case [a union's] injury must be analyzed to determine whether it is of the type that the [ ] statute was intended to forestall."); *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-8 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938). This Court has also looked at the directness or indirectness of the asserted injury. *Associated Gen.*, 459 U.S. at 540.

Where a statute is silent as to whom an appropriate litigant should be, this Court has permitted representation in accordance with standards established under common law or statutes of general application. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (third party representation permissible where the standards under the common law are satisfied); 13 C. Wright, A. Miller, *Federal Practice and Procedure* § 3531.9 at 627 (West 1984) (formal representative such as trustees, guardians and personal representatives may protect the interests of those they represent).

b. "The actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'" *Warth*, 422 U.S. at 500. The right possessed here, is at its heart, one which lies in the federal statutorily established role of unions as the exclusive representative of workers under the National Labor Relations Act. 29 U.S.C. § 151 (1995); See also 29 U.S.C. §§ 157 and 159 (1995); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978).[2] When a union sues to redress a violation of WARN, it acts as the representative of the employees' own choosing for the "purpose of . . . other mutual aid and protection." 29 U.S.C. §§ 151 and 157 (1995). Indeed, protection and enforcement of employees' rights is a union's raison d'etre.

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[2] This fact distinguishes unions as appropriate litigants under WARN from other associations. *See Warth*, 422 U.S. 490.

A union's advocacy for and enforcement of workplace rights is at the core of national policy. As this Court has stated:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wage, hours, and working conditions . . . "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); See 29 U.S.C. § 151 (1995); *See also Office and Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 67 (D.C. Cir. 1992) (R.B. Ginsburg, J.) ("The Union is no mere volunteer whose representation of others must be checked for adequacy. The labor union has already been certified by a neutral government agency as the "exclusive representative" of the bargaining unit employees.")

In enacting WARN, Congress created workplace rights and a means for enforcement of those rights that are akin to those sought or obtained in collective bargaining. It therefore harmonized its statutory role for union representation as the key means for enforcing WARN rights of the employees in bargaining units in which a union has been recognized with those rights employees have pursuant to the National Labor Relations Act. Other than the fact that WARN rights arise from statute, rather than from a collective bargaining negotiation, they are virtually identical in kind to a lay-off notice, or severance agreement, that might be negotiated or enforced in the ordinary course by a union.[3] Suing to obtain monetary

[3] In this regard, the lower courts' attempt to distinguish this Court's holding in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) is telling. The Eighth Circuit opinion found a controlling distinction between an action to seek monetary relief under a collective bargaining agreement, as permitted under *Hoosier Cardinal*, and an action for monetary relief under WARN, as in this case. 50 F.3d at 1430 n.5. Yet the cognizable legal injuries arising from an employer's violation of a collective bargaining agreement, the type of proof needed, and the type of remedy typically sought, are indistinguishable from the same issues arising from a statutory violation.

relief under WARN, therefore, is well within the "other mutual aid and protection" that Congress long ago declared to be a union's proper and lawful activity." 29 U.S.C. § 157 (1995).

c. The Eighth Circuit panel's decision created an artificial gap between the rights of individual union members and those of the union itself.[4] This view rested upon a mistaken view of the rights asserted, which are fundamentally collective in nature.[5] *See Brock*, 477 U.S. at 290;[6] see Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 Mich. L Rev. 733 (1988).

[4] *See Telecommunications Research and Action Center v. Allnet Communication Serv., Inc.*, 806 F.2d 1093 (D.C. Cir. 1986) ("Here the union and its members are in every practical sense identical; the union "is but the medium through which individual members seek to make more effective the expression of their own views.") *Id.* at 1096.

[5] This is evident in WARN's threshold requirements which establish that a violation occurs only where an employer has more than 100 employees and chooses to layoff more than a third of them in a single facility with more than 50 employees. 29 U.S.C. § 2101 (1995). It is thus only when the collective rights of a fairly large group are affected that WARN applies. These numerical requirements are consistent with the genesis of WARN as part of a larger statutory scheme which included worker adjustment provisions. See pp. 12-14.

[6] This Court stated: "[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. 'The only practical judicial policy when people pool their capital, their interests, or their activities under

Virtually all terms and conditions of employment are a product of collective negotiation, and the union is not only the authorized representative of bargaining unit employees in dealing with their employer, it is the exclusive representative. 29 U.S.C. § 159. Where a union has been recognized it alone has the "power to order the relations of employees with their employer . . . ." *Allis-Chalmers*, 388 U.S. at 181. When the employer fails to meet its obligations the union is damaged along with the individuals in its bargaining unit, and that damage can only be remedied by providing the bargaining unit members with the remedy to which they are entitled.

d. This unity of interests between the union and the bargaining unit employees is underscored by the legislative history of WARN. Even though the paramount purpose of WARN is to provide advance notice of employment losses to unions, workers, and their state and local governments, 29 U.S.C. § 2102 (1995), 20 C.F.R. § 639.1 (1995), the Eighth Circuit panel evidently viewed WARN as an individual notice statute, and ignored the union's place within the worker adjustment statutory scheme which Congress has fashioned.

WARN had its genesis in the Omnibus Trade and Competitiveness Act of 1988, which included both advance notice and worker adjustment provisions. *H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. 1045* (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 1547, 2078. While dividing the worker adjustment provisions from those concerning advance notice in the pending trade bill, the "Conferees reaffirm[ed] that advance notice is an essential component of a successful worker readjustment program, and [that] they regard[ed] the two subtitles as closely interrelated." *Id.*[7]

a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.'" *Brock*, 477 U.S. at 290 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951)).

Given its central role in worker readjustment, it is then clear why Section 3 of the statute provided:

> [a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order . . . to each representative of the affected workers . . . or, if there is no such representative . . . to each affected employee; and . . . to the State dislocated worker unit . . . and chief elected official of the unit of local government within which such closing or layoff is to occur.

29 U.S.C. § 2102(a). Thus, WARN required employers to provide advance notice of economic dislocations to unions, not to individual employees. It is only where individual workers are not represented by unions that notice is given directly to them. Appropriate state and local government officials are notified as well.

The principal rationale for WARN's advance notice requirement was to provide time for the affected government units and unions to assist workers with readjustment assistance and reemployment. The main vehicle by which

[7] WARN became freestanding legislation when the trade legislation was vetoed, largely because of Presidential objections to the inclusion of advance notice requirements in the legislation. *See* President's Veto Message, 24 Weekly Comp. Pres. Doc. 655-57 (May 24, 1988). WARN was reintroduced as S. 2527 and passed both houses of the Congress with margins sufficient to survive a veto. 134 Cong. Rec. S. 8868-69 (1988); 134 Cong. Rec. H5519-5520 (1988). WARN was then allowed to become law without the President's signature. Pub. L. No. 100-379, 102 Stat. 890 (1988); Presidential Statement on the Worker Adjustment and Retraining Notification Act, 24 Weekly Comp. Pres. Doc. 990 (August 2, 1988). The sponsors of S. 2527 explicitly noted the relevance of the conference report on H.R. 3 in interpreting WARN. *See* 134 Cong. Rec. S8692 (1988) (statements of Sen. Durenberg and Sen. Metzenbaum); 134 Cong. Rec. H5504-5505 (1988) (statements of Rep. Jeffords and Rep. Clay).

this was to be accomplished was through the previously-linked Economic Dislocation and Worker Adjustment Assistance (EDWAA) Act, 29 U.S.C. §§ 1651-1662b, which passed the Congress as part of the omnibus trade legislation. *Pub. L. No. 100-418, 102 Stat. 1524 (1988).* EDWAA provided adjustment services to dislocated workers by linking state dislocated worker units, local governments, and unions and employers, and Congress designated unions as central to effectuate the full panoply of adjustment activities for their members.[8]

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[8] EDWAA provided for local coordination of dislocated worker assistance primarily through substate grantees, 29 U.S.C. § 1661a(b), working in conjunction with a state job training coordinating council, 29 U.S.C. § 1661f, and state dislocated worker units with rapid response capability, 29 U.S.C. §§ 1661b(b) and 1661c(b). Labor unions were ensured a role in the local coordination of job training and adjustment services through membership on each local Private Industry Council, 29 U.S.C. § 1512(a)(2), as well as membership on the state job training coordinating council, 29 U.S.C. § 1532(a)(3)(C). *See* H.R. Rep. No. 285, 100th Cong., 1st Sess. (1987), *reprinted in* House Subcommittee on Labor-Management Relations, Committee on Education and Labor, 101st Cong., 2d Sess., Legislative History of S. 2527 at 583 *et seq.* (Comm. Print 1990). *See also,* U.S. Department of Labor, Economic Adjustment and Worker Dislocation In A Competitive Society: Report of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation 22-23 (1986) and U.S. Congress, Office of Technology Assessment, Plant Closing: Advance Notice and Rapid Response 5 (1986).

In addition to adjustment assistance under EDWAA, during the interim between the provision of advance notice and the loss of employment, there is an opportunity for employees to seek new employment, or retraining and income support through either the Trade Adjustment Assistance program, 19 U.S.C. §§ 2271-2322, or the NAFTA Transitional Adjustment Assistance program, 19 U.S.C. § 2331. Congress guaranteed labor unions a role under both laws: Labor unions may file petitions for certifications of eligibility on behalf of represented workers under the Trade Adjustment Assistance program. 19 U.S.C. § 2271(a). Unions likewise have a statutory role as petitioners under the NAFTA Transitional Adjustment Assistance program. 19 U.S.C. § 2331(b)(1).

e. Against this backdrop, it is evident that WARN is simply not an individual notice statute and that unions themselves are damaged when they do not receive notice. First and foremost, advance notice permits unions to more effectively exercise their right to represent their members through collective bargaining about the plant closing decision and its effects. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-2 (1981); Otis Elevator Co., 269 NLRB 891 (1984), *enforced in part sub nom. United Food and Commercial Workers Int'l Union, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. 1993), *cert. dismissed*, 114 S.Ct. 2157 (1994).

Next, advance notice to the union permits the union to assist its members in seeking new employment, replacement income, and adjustment services. This assistance to members enables the union to fulfill its responsibilities to advance its members economic interests, and, in turn, creates goodwill on the part of the union's members directed toward the assisting union. This goodwill translates to improved future organizing opportunities with those members in their new workplaces as well as enhanced community standing for the union. When a union fails to assist its members, the union's capacity to act as an effective advocate for its members is weakened. *See OPEIU, Local 2 v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992).

Finally, advance notice may permit the union, the local community, or the employees to arrange for new ownership or an employee buy-out of the facility providing notice, an opportunity which is foreclosed when the closing or mass layoff is a *fait accompli* at the time the announcement is made. First Nat'l Maintenance, 452 U.S. 680, 681 ("[B]argaining over the effects of a decision [to close a particular facility] must be conducted in a meaningful manner and at a meaningful time."). Continuing the business enterprise necessarily assists the union itself, as well as the employees and their community. Further, local or district unions may reside within a geo-

graphical area that includes opportunities for employment so that a union, when given advance notice, can assist workers soon to lose their jobs to find new work at another plant.

In short, the pursuit of a WARN lawsuit advances cognizable interests of both a union and its members by advancing the members' interest in "mutual aid or protection." Thus, the question of whether UFCW members would themselves have standing to redress the same injury relied on in their behalf, which is the first prerequisite under *Hunt*, 432 U.S. at 343, is inseparable from the UFCW's own interests, and should be answered in the affirmative. For this reason, the alleged lack of proper statutory notice in this case clearly injured the UFCW as well as its members, and satisfied Article III's core requirements.[9]

B. Individual Participation of the UFCW Members Is Not Required by the Rights Asserted nor the Relief Requested.

1. *WARN Civil Penalties Are Primarily Intended to Enforce Compliance with Its Advance Notice Provisions, Not to Compensate Individuals Deprived of Notice.*

a. Even had Congress not authorized unions to sue, the UFCW still satisfied the third prong of the standing test promulgated in *Hunt*; namely, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343.

[9] This fact distinguishes this case from *Associated General Contractors*, wherein this Court would not allow a union to pursue treble damages in an action brought under the Clayton Act. 15 U.S.C. § 15. In *Associated General*, this Court noted that the union failed to allege any direct injury, such as the termination of the collective bargaining agreement, a diminishing share of the contracting market controlled by union firms, or declining membership or revenues. 459 U.S. at 542. In the case of a plant closing, a union suffers all of these direct injuries.

This requirement is not a prerequisite to satisfaction of the Article III "case or controversy" requirement, as opposed to "other limits on the class of persons who may invoke the courts' decisional and remedial powers." *Warth*, 422 U.S. at 499. The Eighth Circuit panel, however, expanded the "required participation" requirement well beyond the sort of considerations which this Court has utilized.

These have included concerns that the claim is fundamentally of an individual nature, *see Harris v. McRae*, 448 U.S. 297, 321 (1980) ("the participation of individual members . . . is essential to a proper understanding and resolution of their free exercise claims"), or that it raises concerns for judicial manageability, *Warth*, 422 U.S. at 515 (recognizing that a damages award would be proper if "common to the entire membership").

b. Since all UFCW bargaining unit members who experienced dislocation or termination without proper notice shared the experience in common, with variance only with respect to the actual date of separation, there is no concern similar to that present in *Harris*. A court could easily grasp the issues and facts involved without individual participation. The Eighth Circuit's principal concern, then must have turned on the question of judicial manageability. A fundamental confusion on the part of the Eighth Circuit panel arose primarily from its faulty understanding of the purpose of WARN's civil penalty provisions and the role of individual affected workers in obtaining the monetary relief provided by those penalties. Again, the lower court acted in apparent ignorance of WARN's enforcement scheme, treating WARN's civil penalties as solely equivalent to individual damage awards designed only to compensate individual workers deprived of prior notice of dislocation. This is made clear in footnote 7 of the opinion and its accompanying text, where the court views WARN's civil penalties as necessarily linked to either the members' monetary claims or the UFCW's own monetary loss. 50 F.3d at 1431. WARN

monetary relief, however, is not tied to specific actual monetary losses of an employee, but rather to the length of the employer's statutory violation. Further, this Court's standing cases have never limited cognizable injuries to interests protected by damages measured in strictly monetary terms. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230-31 n.4 (1986); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 & n.20 (1982); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

In fact, Congress intended that WARN's penalty provisions deter employers from failing to provide advance notice of employment losses in order to further compliance with the overall worker adjustment goals of WARN and its related legislation. Rather than compensatory damages measured exclusively in terms of lost wages, WARN's monetary relief provisions most closely resemble civil penalties intended to ensure compliance with WARN, without respect to any monetary loss on the part of the affected workers.[10]

Contrary to the approach taken by the court below, the structure of WARN's civil penalties and its legislative history make it clear that WARN was intended to provide advance notice to workers prior to mass layoffs and plant closings, not as a severance pay scheme providing damage awards for individual workers. The developments in WARN's history demonstrate that Congress' purpose in adopting WARN's penalty provisions went well beyond compensation of workers for lost wages:

First, during the Senate debates on S. 2527 an amendment was offered to permit employers to make severance payments in lieu of advance notice.[11] The principal Sen-

[10] For example, if an employer unlawfully closed a workplace without any prior notice, and all affected employees obtained new work at higher pay the next day, WARN would still provide a monetary remedy.

[11] The so-called Quayle amendment offered employers the options of providing "severance pay in lieu of notice." 134 Cong. Rec. S8541 (1988).

ate sponsor of WARN opposed the amendment, and stated:

> The fact is we do provide that if the notice is not given then there is an obligation to make up the salary, but we do not want anybody to think that this bill is a way of providing additional financial obligations on the part of employers. This is not the object of this bill. The object of this bill is to give employees notice so that they can be involved in retraining and readjustment.

134 Cong. Rec. S8542 (1988) (remarks of Sen. Metzenbaum). Congress rejected the proposed amendment,[12] which evidenced an intent to accomplish more through WARN than simply providing affected workers deprived of advance notice with penalties providing up to sixty days' back pay.

Second, the language of WARN's penalty provisions arose in its predecessor bill, S.538, which was later added as an amendment to the trade legislation by the Senate.[13] The Senate committee summarized the bill's penalty provisions and their intent:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusions of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions (sic), designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987), *reprinted in* Legislative History of S. 2527, *supra* n.3 at 742.

[12] 134 Cong. Rec. S8547 (1988).

[13] 133 Cong. Rec. S9492-9494 (1987).

This legislative history, as well as the overall structure of WARN's penalty provisions, manifests the error of treating WARN's civil penalties as equivalent to individual damage awards to affected workers. While Congress adopted a private enforcement scheme as a means to enforce WARN, it did so with its advance notice ends in mind, not in an effort to provide damage awards to individual affected workers. For this reason, the essential feature of WARN's civil penalties was compliance and deterrence, not compensation.

b. The distinction between compliance and compensation is by no means trivial. First of all, the lower court's restrictive understanding of the role played by monetary relief in WARN enforcement undergirds its determination that monetary relief for affected workers would not redress the injuries inflicted upon the UFCW by the lack of advance notice. 50 F.3d at 1430. Instead, an anomalous result of the decision below is to effectively prohibit unions from obtaining redress for themselves or its members as a result of an employer's failure to comply with the notice requirements. As the Eighth Circuit panel itself admitted, it would have denied a request for injunctive relief because the statute precludes federal courts from enjoining a plant closing or mass layoff. 29 U.S.C. § 2104(b) 1995 ("[I]t is doubtful that injunctive relief would have been forthcoming even if it had been sought."). 50 F.3d at 1431 n.6. Yet nothing in the legislative history suggests that Congress intended to grant a right of notice to unions but then deny unions any method of redress. Indeed, as discussed above, such a conclusion is completely contrary to the purpose of the statute.

Second, this restrictive understanding divorced WARN from its central role in Congress' worker adjustment scheme, and undergirds its determination that the individual participation of UFCW members was required. Viewed in proper context, WARN's civil penalties were intended to encourage employer compliance with the statute's advance notice requirements—including its role for unions in adjustment assistance and retraining.

Accordingly, any monetary relief obtained by unions for affected members promotes the advance notice goals of WARN and its attendant advantages to unions since it penalizes the particular employer who violates the advance notice requirement, and encourages that employer and others to comply with WARN in the future. For this reason, individual participation of union members is not necessary, and monetary relief to affected members in a suit prosecuted by the union clearly redresses the injury suffered by the union *and* its members.

2. *Union Representation of Its Members in WARN Actions Does Not Present Concerns of Judicial Manageability.*

a. Another confusion on the part of the Eighth Circuit panel arose from its faulty understanding of the practicalities of determining the amount of monetary relief in any one case. Individual participation is not essential to give effect to the monetary calculation because the calculation, contrary to the lower court's characterization, is simple, requiring only the date of each employee's separation, the rate of pay, and the amount of any offsets available to the employer. These matters are known to the employer, and the union, and no individual member testimony is required or relevant to that determination.[14] There is no need to inquire, as in cases involving severance pay, whether severance occurred by way of firing for cause, furlough, reduction in force, or termination. Thus, like *Brock*, questions regarding the monetary calculation for each individual do not require judicial inquiry. 477 U.S. at 286. *See Carpenters Dist. Council v. Dillard Dep't.*

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[14] A parallel distinction is made under Rule 23 of the Federal Rules of Civil Procedure. There, of course, a Rule 23(b)(2) class may be utilized to obtain equitable relief, including back pay, without prior written notice to class members. In contrast, cases seeking damage awards must proceed under Rule 23(b)(3), with individualized notice to class members and an opportunity to opt out of the class. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Stores, 790 F. Supp. 663 (E.D. La. 1992), *amended*, 7 I.E.R. Cases 799 (E.D. La. 1992), *aff'd in part and rev'd in part, remanded*, 15 F.3d 1275 (5th Cir. 1994), cert. denied, 115 S.Ct. 933 (1995). Further, the civil penalties are not speculative or large, as in a case like *Associated General Contractors*, 459 U.S. at 542-546.

Indeed, the common issues involved in litigating a WARN case far outweigh those with individualized elements. In addition to employer liability, the maximum duration of the penalty period involved, the type and value of fringe benefits included in the calculation of back pay, and the offsets, if any, available to the employer are common to all claims. Each of these matters is likewise feasibly determined without individual member participation, and these determinations present no unusual case management challenges.

The relative simplicity of the damage computations ensures that the UFCW "can litigate this case without the participation of those individual claimants and still ensure that 'the remedy, if granted will inure to the benefit of those members of the association actually injured.'" *Warth*, 422 U.S. at 515.

b. The second of the considerations with respect to the relative ease of case manageability is that litigation of this case by the union as plaintiff does not differ greatly from litigation of the case as a class action brought by individually affected workers. Anomalously, under the Eighth Circuit's holding, such a lawsuit could proceed on behalf of similarly situated workers while a virtually identical lawsuit by the union on behalf of its members would be dismissed for lack of standing.

However, in terms of judicial economy, the use of union plaintiffs offers distinct advantages, whether compared to a class action by individuals, or a number of separate lawsuits filed to remedy the same WARN violation. *See Brock*, 477 U.S. at 289 (1986) ("While a class action creates an ad hoc union of injured plaintiffs . . .

[a union] suing to vindicate the rights of its members can draw upon a preexisting reservoir of expertise and capital."). Unions usually have greater familiarity with the employer, the collective bargaining agreement, and the history and background of the workplace than individual workers or plaintiff attorneys. Union staff are available to assess a variety of relevant questions, including possible defenses under the unforeseen business circumstances and faltering company exceptions to WARN liability, 29 U.S.C. §§ 2102(b)(1) and (2)(A), and the good faith defense, all of which can become quite complex.[15] Moreover, unions possess an institutional interest in specific geographical areas which means that they may be better suited to act as plaintiffs than individuals who may be forced to move away in search of employment. Not insignificantly, from the perspective of the aggrieved employees, a union plaintiff offers numerous advantages, including free legal representation and assistance with the costs of litigation. *See Brock*, 477 U.S. at 289.

For these and similar reasons, a union plaintiff will often be in a position to prosecute a WARN suit more expeditiously than parties or attorneys less familiar with the situation. Indeed there has been relatively little litigation under this law, as the General Accounting Office found, due in part to the difficulty in finding experienced attorneys. GAO, *Dislocated Workers: Worker Adjustment and Retraining Notification Act Not Meeting its Goals*, 23-24 (1993). Further, if each worker who is

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[15] See *International Bhd. of Teamsters, Local 952 v. American Delivery Serv. Co.*, 50 F.3d 770 (9th Cir. 1995); *Carpenters Dist. Council v. Dillard Dep't Stores*, 778 F. Supp. 297 (E.D. La. 1991), *aff'd*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 933 (1995); *Jurcev v. Central Community Hospital*, 7 F.3d 618 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1830 (1994); *Chestnut v. Stone Forest Indus.*, 817 F. Supp. 932 (N.D. Fla. 1993); *Frymire v. Ampex Corp.*, 61 F.3d 757 (6th Cir. 1995); *Jones v. Kayser-Roth Hosiery*, 748 F. Supp. 1276 (E.D. Tenn. 1990); *Washington v. Aircap Indust.*, 860 F. Supp. 307 (D.S.C. 1994); *Wholesale and Retail Food Distribution Local 63 v. Santa Fe Terminal Servs.*, 826 F. Supp. 326 (C.D. Cal. 1993).

laid off or suffers termination brings a separate claim, then the courts will be clogged with multiple lawsuits arising out of the same set of circumstances. If several individuals join together and retain a single attorney, or the claim is brought as a class action, then there has been the de facto creation of a quasi-union, although one presumably without the same legal resources and expertise in workplace-related issues. This effectively denies workers many of the most significant advantages of union membership. See 29 U.S.C. §§ 151, 157 (1995).

CONCLUSION

The decision below rested upon a fundamental misconception of the role of labor unions in this country, creating an artificial gap between the interests of workers and unions, and one which stands in contrast to national labor policy as codified in our federal laws. WARN is, in the final analysis a statute designed to protect collective interests. Violations of that law are redressable through the civil penalties created by Congress.

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